SUPREME COURT

Appellate Division---Fourth Department.

ANNA MARIE TALBERT, as administratrix, etc., of Robert Talbert, deceased,
Respondent,
against
JAMES STORUM as administrator, of etc., of William Storum, deceased, *Appellant*.

131

APPEAL BOOK.

PHILIP A. LAING,
Attorney for Respondent.

JONATHAN L. SLATER,
Attorney for Appellant.

BUFFALO:
W. H. WRIGHT, JR., PRINTER,
18 & 20 ELLICOTT ST.
1896.

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STATEMENT REQUIRED BY RULE 41. A

The summons in the action brought by Robert Talbert, sueing as the assignee of William Storum, against the Mutual Reserve Fund Life Association, was served May 6th, 1891; the Association duly appeared and demanded a copy of the Complaint which was served. On May 23, 1891, James Storum was appointed administrator of the estate of William Storum by the Supreme Court of the District Court of Columbia. That on July 20th, 1891, the Supreme Court ordered the said Associa- B
tion to pay to the Clerk of the County of Erie said death claim amounting to $1000.00, less its taxable costs, and that upon such payment that it be discharged from further liability and that said James Storum as administrator as aforesaid be substituted as defendant herein. That on August 6th, 1891, said Association paid to said Clerk the sum of $989.51, and by a supplemental Summons and Complaint, served October 7th, 1891, the defendant administrator was brought in as sole de- C
fendant, and on July 16th, 1892, served his answer herein.

That on December 13th, 1892, said Robert Talbert died intestate and thereafter Anna Maria Talbert was duly appointed administratrix of all and singular the goods, chattels and credits which were of said Robert Talbert, and, by an order of the Supreme Court made March 3rd, 1893, this action was revived and continued in her name as such.

Farrington, Laing & Kelly, of Buffalo, were the attorneys for the original plaintiff and continued D
as attorneys for the plaintiff after the action was revived.

F. A. Burnham, of 150 Canal Street, New York City, was the attorney for the original defendant-association, but upon the substitution of the defendant-administrator in the place of the Association, Jonathan L. Slater became and has remained the attorney for the defendant.

That no other change in parties or attorneys in this action has been made except as hereinbefore set-forth.

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NEW YORK
SUPREME COURT
ERIE COUNTY.

ROBERT TALBERT

against

MUTUAL RESERVE FUND LIFE ASSOCIATION.

Please take notice that the defendant, the MUTUAL RESERVE FUND LIFE ASSOCIATION has this day paid to C. A. Orr, Esq., Clerk of the County of Erie, the sum of Nine hundred and eighty-nine 50-100 dollars, being the sum of $1000 less its costs as taxed herein, under and pursuant to the order entered in this action and filed with the said Clerk of Erie County on the 20th day of July, 1891.

Dated New York, August 6th, 1891.

F. A. BURNHAM,
Defendant's Attorney,
150 Canal St., New York.

To

FARRINGTON, LAING & KELLY, ESQRS.,
Plaintiff's Attorneys,
56 Niagara St., Buffalo, N. Y.

And

JAMES STORUM, as Administrator, etc.,
2004–17th St., Washington, D. C.

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5 SUPREME COURT, ERIE COUNTY.

ROBERT TALBERT,
Plaintiff,
vs.
JAMES STORUM, as administrator of the goods, chattels and credits of William Storum, deceased,
Defendant.

6 (*Substituted in the place of the Mutual Reserve Fund Life Association.*)

The plaintiff by Farrington, Laing & Kelly, his attorneys, for his supplemental complaint herein, made and served in pursuance of and compliance with the order of this court made herein on or about the 20th day of July, 1891, alleges as follows:

7 That the plaintiff is a resident of the county of Erie; and he further alleges upon his information and belief, that the said former defendant Mutual Reserve Fund Life Association, is a domestic corporation duly incorporated under the laws of the State of New York, and having its business office at the City of New York in said State, and which said corporation has for its object the giving of
8 material aid, under its power as a corporation, to the members of the said corporation, in accordance with its charter, by-laws and regulations, and also for the establishment of a benefit fund from which to pay members, upon their death, who shall have secured certificates of membership to be issued by said corporation in accordance with its charter, by-laws, rules and regulations, in the amount and as specified in such respective certificates.

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That the said corporation is duly authorized to 9
transact business throughout this State and the United States, and in particular the said corporation was duly authorized to enter into the contract and issue the certificate of membership hereinafter referred to, and also to consent to the assignment thereof to this plaintiff, and to make the payment to the plaintiff of the said sum in said certificate specified upon the death of the said member, as in said certificate 10
specified, and as in the assignment of said certificate hereinafter referred to, is specified.

The plaintiff further alleges, upon his information and belief, that on the 7th day of August, 1883, in consideration of the certain agreements made by and with William Storum, then a member of the said corporation, which are referred to in the said benefit certificate, a copy of which certificate of membership is hereto attached and is made a part 11
of this complaint and is marked "A", the said corporation did issue its said certificate of membership for the sum of one thousand dollars ($1,000) payable as in said certificate specified to which reference is made.

That thereafter and on the 26th day of October, 1883, the said William Storum, for a valuable consideration, sold, assigned, transferred and set 12
over unto this plaintiff the said certificate of membership and all sums of money, interest, benefit and advantage whatsoever then due or thereafter to arise or to be had or made by virtue thereof; which assignment was thereafter and on the 2nd day of November, 1883, duly approved and consented to by the said corporation, the plaintiff possessing an

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insurable interest in the said number equal to the amount assigned. All which contracts, certificates, assignment, consent to assignment, and matters were duly made and were and are valid.

The plaintiff further alleges that he is the holder and owner of the said certificate, and that said William Storum died on or about the 15th day of January, 1891, being then a member of the said corporation.

And this plaintiff further alleges that the terms and conditions mentioned in said certificate to be performed by and on the part of the said William Storum, and all of the terms, conditions and requirements required in the premises, have been duly performed; and that notice of the death of the said William Storum was given to the said corporation as required by the rules and regulations of the said corporation, more than ninety days prior to the commencement of this action, and that the time limited for the bringing of this action has not elapsed.

The plaintiff further alleges upon his information and belief, that this action was begun by the service of the summons and notice on the said Mutual Reserve Fund Life Association on or about the 6th day of May, 1891, and thereafter the said corporation duly appeared in said action by attorney, and demanded the plaintiff's complaint herein which was thereupon duly served by plaintiff upon said defendant corporation.

The plaintiff further alleges upon his information and belief, that in the mean time the said James

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Storum was duly appointed the administrator of 17
the goods, chattels and credits of William Storum, deceased, by the Surrogate's Court or other duly authorized court in the City of Washington, in the District of Columbia, where the said William Storum resided at the time of his death, and where the said James Storum resides.

The plaintiff further alleges upon his information and belief, that after such appointment the said 18
administrator presented a claim to the said corporation for the said money claimed by this plaintiff, and thereupon such proceedings were had upon the stipulation and papers of the said several parties that an order of this court was made on or about July 20th, 1891, and duly entered, providing, among other things, that the said corporation should pay to the Clerk of Erie County the said sum of one thousand dollars ($1,000) less the amount of tax- 19
able costs to the said corporation, defendant, and upon such payment that the said corporation should be discharged and released from further liability to the plaintiff and to the said administrator by reason of the cause of action set forth in the complaint; and that the said administrator be substituted as the defendant in this action in the place and stead of said corporation, and further providing 20
for the service of this complaint upon the said administrator.

The plaintiff further alleges upon his information and belief, that the said corporation did afterwards and heretofore pay to the said Clerk of the County of Erie the sum of nine hundred and eighty-nine dollars and fifty-one cents ($989.51) being the sum

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of one thousand dollars less its costs as taxed herein, in pursuance of the aforesaid order.

The plaintiff further alleges upon his information and belief, that by reason of the premises the plaintiff is entitled to receive the said sum so paid into court by the said corporation, together with the interest thereon.

Wherefore the plaintiff demands judgment for the said sum and the interest thereon, damages, besides the costs of this action, against the said James Storum as administrator, etc., defendant herein, and for such further or other relief as may be just and proper in the premises.

FARRINGTON, LAING & KELLY,
Plaintiff's Attorneys,
56 Niagara Street, Buffalo, N. Y.

"A"

NUMBER 14368. AGE 62.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Bryant Building,
Corner Nassua & Liberty Streets, New York.

In Consideration of the statements, representations and warranties contained in the application for this Certificate of Membership, and of the admission fee paid and of the dues to be paid for expenses on or before the third day of August in every year during the continuance of this certificate and of all mortuary assessments as per table endorsed hereon, payable at the principal office of the

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association in the City of New York, within thirty 25
days from the date of each notice, the Mutual Reserve Fund Life Association does hereby receive William Storum, of Washington, District of Columbia, United States of America, as a member of said association.

Whenever the death fund of the association is insufficient to meet the existing claims by death, an assessment shall be made upon the entire mem- 26
bership in force at the date of the last death, the same to be apportioned among the members according to the age of each member, for such a sum as the executive committee may deem sufficient to cover said claims, and the net amount received from such assessments (less twenty-five per cent. to be set apart for the reserve fund) shall go into the death fund.

27

Within ninety days after receipt of satisfactory evidence to the association of the death of the above-named member, during the continuance of this certificate of membership, there shall be payable to the legal representatives of William Storum (self) of Washington, District of Columbia, United States of America, the sum of one thousand dollars from the death fund of the association at the time of said death, or from any monies that shall be 28
realized to the said fund from the next assessment to be made as herein above set forth, and no claim shall be otherwise due or payable, except from the reserve fund as hereinafter provided.

The net earnings of the Association, together with the twenty-five per cent. of the net receipts from each assement, shall constitute a reserve fund,

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which shall be deposited with a trust company, and be securely invested in United States bonds, Mortgages, or other interest-bearing securities, by said trust company, as trustee, for the exclusive benefit of the members of the association, and the interest on the same, as it accrues, shall be placed by the said trustee to the credit of the death fund. The reserve fund, above $100,000, and in excess of sums represented by outstanding bonds, shall be applied to the payment of claims in excess of the American Experience Table of Mortality, and when any claim by death is due, to making up any deficiency that may then exist in the death fund.

After the expiration of each period of five years, during the continuance of this certificate of membership, a bond will be issued (bearing interest at the rate of four per cent. per annum, payable annually to the death fund), for an equitable proportion of the reserve fund, and the principal of said bond shall be available ten years from its date towards paying future dues and assessments under this certificate; and, should membership hereunder cease by death or otherwise, any portion of said principal, not thus used, shall be applied to increase the bonds issued at the next quinquennial apportionment to other members of the association holding certificates issued during the same year as this certificate, and at which apportionment, the rate of assessments may be thereafter changed to correspond with the actual mortality experience of the association.

No alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be

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waived, unless such alteration or waiver shall be in 33
writing, and signed by the president and one other
officer of the association.

No agent of the Association has authority to make, alter or discharge contracts, waive forfeitures, extend credit, or grant permits.

This Certificate is not binding until the first payments due thereunder shall have been fully received in cash by the Association, or by some agent auth- 34
orized to receive the same, and during the life of the said member, and shall be subject to all the provisions and stipulations contained in the Constitution and by-laws of this Association, with the amendments thereto.

A notice addressed to a member at his post-office address as appearing upon the books of the Association, according to its usual course of business, shall 35
be deemed a sufficient notice, and proof of mailing the same, according to the usual course of business of said association, shall constitute and be deemed and held sufficient proof of compliance herewith on the part of said association.

Written notice of all assignments to be valid must be received and approved by the association; and the beneficiary or assignee must possess an insurable 36
interest in the above-named number, equal to the amount assigned.

This certificate is issued and accepted subject to the express condition that if any of the payments above stipulated shall not be paid when due, at the office of the association in the city of New York, or

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to an agent of the association furnished with a receipt signed by its president, secretary, or treasurer; or if the member during the continuance of this certificate shall engage in blasting, mining, submarine, or aeronautic operations, or the production of highly inflammable or explosive substances; or upon a railroad as brakeman or baggageman, or as conductor of a freight train; or in working or managing a steam engine in any capacity, or shall engage in service upon a sailing vessel, or shall enter any military or naval service whatsoever (the militia when not in actual service excepted), without the consent of this association therefor, in either of the foregoing cases, given in writing by the president or secretary thereof; or if the member shall die by his own hand, within two years from the date of this certificate, whether sane or insane; or if any of the statements, answers, or declarations made in the application for this certificate, which application is hereby referred to and made a part hereof, are in any respect untrue; then, and in each and every such case, this certificate shall be null and void, and all payments made thereon shall be forfeited to the association.

In witness whereof, the said Mutual Reserve Fund Life Association has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president or vice-president and secretary, at the City of New York, this 7th day of August, one thousand eight hundred and eighty-three.

E. B. HARPER, President,
J. M. STEVENSON, Asst. Sec'y.

(Seal) Examined J. H. J. self.

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TABLE OF RATES.

41

ADMISSION FEE.

$1,000—$8.00. $2,000—$12.00. $3,000—$15.00.
$5,000—$20.00. $10,000—$30.00.

DUES.

The dues for expenses are limited to $2.00 on each $1,000, payable annually in advance.

42

ASSESSMENT RATE TABLE.

No assessments will be made while there remains in the death fund a sum sufficient to pay the existing claims in full.

The basis for the assessment rate for each member, according to the age taken at the nearest 43
birthday, on each $1,000, shall be as follows:

Age. Rate.	Age. Rate.	Age. Rate.	Age. Rate.	Age. Rate.
15-25-$1.00	34-$1.20	42-$1.52	50-$2.00	58-$4.00
26—1.02	35—1.24	43—1.56	51—2.25	59—4.25
27—1.04	36—1.28	44—1.60	52—2.50	60—4.50
28—1.06	37—1.32	45—1.64	53—2.75	61—5.00
29—1.08	38—1.36	46—1.68	54—3.00	62—5.50
30—1.10	39—1.40	47—1.72	55—3.25	63—6.00
31—1.12	40—1.44	48—1.76	56—3.50	64—6.50
32—1.14	41—1.48	49—1.80	57—3.75	65—7.00
33—1.16				

44

This Association is not required by law to maintain the reserve which is required of ordinary life insurance companies.

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45 County of Erie, }
City of Buffalo. } ss.

Robert Talbert being duly sworn, deposes and says that he is the plaintiff in this action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and
46 belief, and as to those matters he believes it to be true.

Sworn to before me, this 30th }
day of September, 1891. }

ROBERT TALBERT.

Minnie F. Bissell,
Comm'r of Deeds,
for Buffalo, N. Y.

47

48

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SUPREME COURT, ERIE COUNTY. 49

ROBERT TALBERT,

vs.

JAMES STORUM, as administrator of the estate of William Storum deceased, interpleaded in the place of the MUTUAL RESERVE FUND LIFE ASSOCIATION.

50 And now comes the Defendant and by Jonathan L. Slater his attorney answering the complaint of the plaintiff herein:

First: The said defendant admits, that the said former defendant, the Mutual Reserve Fund Life Association is a domestic corporation duly incorporated under the laws of the State of New York, and that its objects are substantially as stated and al- 51 leged in complaint of the plaintiff herein:

Second: Said defendant further admits that on the 7th day of August, 1893, in consideration of the certain agreements made by the said William Storum referred to in the complaint of the plaintiff herein, the said corporation did issue to him its said certificate of membership for the sum of One thousand ($1000.00) dollars payable as in said certificate 52 specified:

Third: Said defendant further admits that the said William Storum died on or about the 15th day of January 1891, being then a member of the said corporation, and that said defendant has been duly appointed administrator of the goods, chattels

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53 and credits of said William Storum deceased, as stated and alleged in the complaint of the plaintiff herein:

Fourth: Said defendant denies each and every allegation contained in the 5th folio count or paragraph in the said complaint beginning with the words "that thereafter" and ending with "are valid:"

Fifth: Said defendant denies each and every al-
54 legation contained in the 3rd folio count or paragraph in said complaint, except as hereinbefore specifically admitted:

Sixth: As to the allegation, that the said plaintiff is the holder and owner of the said certificate, your defendant has no knowledge or information sufficient to form a belief, and therefore denies the same:

55

Seventh: Said defendant denies that by reason of the premises stated in the said complaint, the said plaintiff is entitled to receive the said sum paid into Court by the said Corporation:

WHEREFORE, your defendant demands judgment that the complaint of the said plaintiff be dismissed with costs, and that he be adjudged, entitled to receive the money paid into court by the said Mut-
56 ual Reserve Life Fund Association, and for such other or further relief as to the Court may seem just.

JONATHAN L. SLATER,
Defendant's Attorney,
14 West Seneca St., Buffalo, N. Y.

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57

DISTRICT OF COLUMBIA, }
CITY OF WASHINGTON. } ss.

JAMES STORUM being duly sworn deposes and says, that he is the defendant in the above entitled action, that he has heard read the foregoing answer and knows the contents thereof, that the same is true to the knowledge of depenent, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes 58
them to be true.

Sworn and subscribed before me, }
this 13th day of July, 1892. }

JAMES STORUM,
Administrator.

DOUGLAS B. MCCARY,
Notary Public.

59

DISTRICT OF COLUMBIA ss:

I, JOHN R. YOUNG, Clerk of the Supreme Court of the district of Columbia, the same being a Court of Record, do hereby certify that Douglas B. McCary Esq., whose name is subscribed to the certificate of proof or acknowledgement of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgement, a Notary 60
Public in and for said District, duly commissioned and sworn and authorized by the laws of said district, to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said District. And further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to

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61 said certificate of proof or acknowledgement is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Washington, D. C., the 13th day of July, A. D. 1892.

J. R. YOUNG, Clerk.

By L. P. WILLIAMS, Assistant Clerk.

62

SUPREME COURT, ERIE COUNTY.

ROBERT TALBERT,

vs.

JAMES STORUM as administrator etc. of William Storum, deceased. In the matter of the
63 petition of Anna M. Talbert as administratrix, etc. of Robert Talbert, deceased, to have continued an action pending in this court between the said Robert Talbert, plaintiff, and the said James Storum as administrator, etc. of William Storum, deceased.

To the Supreme Court, held in and for the County
64 *of Erie:*

The petition of Anna M. Talbert, administratrix of the goods, etc. which were of Robert Talbert, deceased, shows to the Court:

1st. That heretofore one Robert Talbert commenced an action in this court against the Mutual Reserve Fund Life Association, to recover the sum

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of One Thousand ($1000.00) Dollars upon a certain membership certificate or insurance policy theretofore issued by the said association to one William Storum, payable upon the death of the said William Storum, he having died before the said action, and the said Robert Talbert being at the time of such death the owner and holder of said certificate or policy and entitled to receive the money payable thereon, as is alleged in and will more fully appear in the said complaint of the said Robert Talbert duly verified in the said action, to which reference is hereby made. 65 66

2nd. That thereafter such proceedings were had in said action that the said association paid the said moneys into court and the said defendant, James Storum, as administrator, etc., was substituted as defendant in this action, in the place of said association. 67

3rd. That thereupon the said defendant Storum applied to the court for an order directing the plaintiff to serve a bill of particulars in this action, which motion was denied and the defendant appealed to the General Term of this court; which appeal was argued and submitted at the Rochester General term in October, 1892, and a decision rendered at the Buffalo General term of January, 1893, affirming the said order appealed from. 68

4th. That the defendant has also served an answer in said action, being in purport a general denial of the complaint.

5th. That the said Robert Talbert died on or about the 13th day of December, 1892, and pending

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69 the said action, intestate and that letters of administration upon his estate were duly made and issued on the third day of February, 1893, by the Surrogate of the County of Erie to your petitioner, who has qualified and entered upon her duties as such administratrix.

6th. That at the time of his death the said benefit certificate or policy, chose in action, property,
70 right and cause of action set out and referred to in the complaint in this action, was still owned by the said Robert Talbert and the same is now held by this petitioner as such administratrix and forms a part of the assets in her hands belonging to the estate of the said Robert Talbert, deceased; and the amount thereof, with the interest thereon, is still due to this petitioner and unpaid, except as to the payment into court as aforesaid.

71

7th. That the said Robert Talbert died after the said appeal from the said order and before the decision thereof was rendered by said General Term.

8th. That your petitioner is desirous of continuing the action above referred to as administratrix, etc. of the said Robert Talbert, deceased, against the said Storum as administrator, etc.

72 Wherefore your petitioner prays that the said action may be so continued by her and that your petitioner have leave to amend the complaint herein as she may be advised and that she may enter and serve the said order of affirmance so granted by the said General Term and be substituted in the

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stead of the said Robert Talbert, deceased, as plain- 73
tiff in the said action, and that she have such further relief in the premises as may be just.

Dated, Buffalo, N. Y., February 23rd, 1893.

ANNA M. TALBERT.

STATE OF NEW YORK,
COUNTY OF ERIE, } ss.
CITY OF BUFFALO.

ANNA M. TALBERT, being duly sworn, deposes 74
and says that she is the petitioner in this action; that she has read the foregoing petition and knows the contents thereof; that the same is true to her knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

Sworn to before me, this 23rd day of February, 1893. 75

ANNA M. TALBERT.

JNO. J. FINCH,
Notary Public, Erie Co., N. Y.

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77 SUPREME COURT, ERIE COUNTY.

ROBERT TALBERT
vs.
JAMES STORUM as administrator etc. of William Storum, deceased. In the matter of the petition of Anna M. Talbert, as administratrix, etc. of Robert Talbert, deceased, to have
78 continued an action pending in this court between the said Robert Talbert, plaintiff and the said James Storum, as administrator, etc. of William Storum, deceased.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO, } ss.

79 BUTLER S. FARRINGTON, of the city of Buffalo, N. Y., deing duly sworn says that he is one of the attorneys for Robert Talbert in his lifetime in the foregoing petition, which petition, deponent has read and knows the contents of.

That the said action was commenced, issue joined therein and was pending and undetermined and in the condition at the time of the death of said Rob-
80 ert Talbert as stated in the said foregoing petition.

That Jonathan Slater, of Buffalo, N. Y., is the attorney of the said defendant in said action.

Sworn to before me this
27th day of February, 1893. } B. S. FARRINGTON.

FAYETTE KELLY,
Notary Public.

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SUPREME COURT, Erie County. 81

ROBERT TALBERT,
vs.
JAMES STORUM as administrator etc. of William Storum, deceased. In the matter of the petition of Anna M. Talbert as administratrix, etc. of Robert Talbert, deceased, to have continued an action pending in this court between the said Robert Talbert, plaintiff and the said James Storum as administrator, etc. of William Storum, deceased. 82

It is hereby stipulated and consented that, upon the foregoing petition of Anna M. Talbert, administratrix, etc., dated February 23rd, 1893, and the affidavit of Butler S. Farrington, verified February 83
27th, 1893, the said action may be revived and continued in the name of the said Anna M. Talbert as administratrix, etc., of the said Robert Talbert, deceased, as plaintiff and that the said administratrix be substituted as plaintiff in the said action, in the place and stead of the said Robert Talbert, deceased, and that such revival and continuance be without prejudice of any of the proceedings already had in said action and that an order to this 84
effect may be entered without further notice.

Dated, February 28th, 1893.

JONATHAN L. SLATER,
Attorney for the defendant,
James Storum as administrator etc.

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85 At a Special Term of the Supreme Court held at the City and County Hall in the City of Buffalo, in and for the County of Erie on the 3rd day of March, 1893.

Present: Hon. Manly C. Green, Judge.

SUPREME COURT, Erie County.

Robert Talbert,

86 vs.

James Storum as administrator etc. of William Storum, deceased. In the matter of the petition of Anna M. Talbert, as administratrix, etc. of Robert Talbert, deceased, to have continued an action pending in this court between the said Robert Talbert, plaintiff and the said James Storum as ad-
87 ministrator etc. of William Storum, deceased.

On reading and filing the petition of Anna M. Talbert as administratrix, etc. duly verified on the 23rd day of February, 1893, and the affidavit of Butler S. Farrington, verified the 27th day of February, 1893, and the stipulation of the attorneys of record for the respective parties to the above en-
88 titled action, dated the 28th day of February, 1893, showing the death of the said Robert Talbert, the plaintiff in the above entitled action, and the grants of letters of administration upon his personal estate to the said Anna M. Talbert, by the Surrogate of Erie County and on motion of Farrington, Laing & Kelley, plaintiff's attorneys,

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ORDERED that this action be and the same hereby 89
is revived and continued in the name of the said Anna M. Talbert as administratrix of the goods, chattels and credits of the said Robert Talbert, deceased, as plaintiff; and that the said administratrix be and she hereby is substituted as plaintiff in the place and stead of the said Robert Talbert, deceased, and that such revival and continuance be without prejudice of any of the proceedings already 90
had in this action.

TAKE NOTICE of an order duly granted on the 3rd day of March, 1893, in the within entitled action, and duly entered in the office of the clerk of the said court, at the City of Buffalo, N. Y., on the 3rd day of March, 1893, of which the annexed is a copy and which is herewith served upon you.

Dated, March 3rd, 1893.

91

Yours, etc.,
FARRINGTON, LAING & KELLY,
Attorneys for Plff.
56 Niagara St., Buffalo, N. Y.

To JONATHAN L. SLATER,
Defendant's Atty.

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93 SUPREME COURT, ERIE COUNTY.

ANNA MARIA TALBERT, as administratrix of etc., Robert Talbert, deceased,

against

JAMES STORUM, as administrator of etc., William Storum, deceased.

94 To FARRINGTON, LAING AND KELLY, Esqs.,
Attorneys for Plaintiff:

TAKE NOTICE, that the defendant in this action hereby offers to allow judgment to be taken therein; that out of the fund deposited with the clerk of the county of Erie in or to the credit of this action, the plaintiff be paid any assessments or premiums with interest thereon from the time of payment
95 that he may have paid on account of the premiums or assessments due upon the certificate of membership or policy of insurance issued by the Mutual Reserve Fund Life Association to and upon the life of William Storum the defendant's intestate, besides the costs of this action, and that the balance of said fund be paid to the defendant or his attorney.

And to that end the defendant hereby consents
96 that a reference be had to ascertain the sum that should be paid the plaintiff under the foregoing offer.

Dated March 24, 1894.

J. L. SLATER,
Defendant's Attorney.

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STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO, } ss. 97

JONATHAN L. SLATER being duly sworn says, he is the attorney for the defendant in the above entitled action and subscribed the foregoing offer and consent, and that he was and is duly authorized to make said offer in behalf of the defendant.

Sworn to before me this 24th day of March, 1894. } J. L. SLATER. 98

MARVIN SMITH,
Commissioner of Deeds.

At a Special Term of the Supreme Court held at the City and County Hall, in the City of Buffalo, in and for the eighth judicial district of the State of New York, on the 12th day of July, 1894. 99

Present, HON. HAMILTON WARD, Justice presiding.

SUPREME COURT, ERIE COUNTY.

ANNA MARIA TALBERT, as administratrix of etc. of Robert Talbert, deceased.
against
JAMES STORUM as administrator of etc. of William Storum, deceased. } Order of reference. 100

On reading and filing the stipulation of the parties hereto by their respective attorneys, dated July 7, 1894, it is on motion of Mr. Marvin Smith, of counsel for the defendant,

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101 ORDERED that this action and the issues therein be and they are hereby referred to Clarence M. Bushnell, Esquire, to hear, try and determine.

Filed July 12, 1894.

SUPREME COURT, GENERAL TERM, FIFTH DE-
102 PARTMENT.

ANNA MARIA TALBERT, as administratrix of etc. Robert Talbert, deceased,

against

JAMES STORUM as administrator of etc. William Storum, deceased.

CASE AND EXCEPTIONS.

103 The Mutual Reserve Fund Life Association was originally incorporated under Chapter 267 of the Laws of 1875 and was re-incorporated under Chapter 175 of the Laws of 1883.

On or about the seventh day of August, 1883, the said Association issued to William Storum its "Certificate of Membership" No. 14368, sealed that day at the city of New York, wherein and whereby
104 it undertook, among other things, on certain contingencies to pay to the legal representatives of William Storum, the sum of One thousand dollars.

William Storum died intestate at Washington D. C. on the fifteenth of January, 1891, aged about seventy years, and the said Association became liable under its Certificate to pay said sum of one

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thousand dollars, and thereupon, thereafter, Robert 105
Talbert, suing as the assignee of William Storum, brought this action against said association, and the summons was served on or about May 6, 1891. The association duly appeared and demanded a copy of the complaint which was served. In the meantime, on May 23, 1891, James Storum was duly appointed administrator of the goods, chattels and credits which were of William Storum, by the 106
Supreme Court of the District of Columbia, and, after such appointment, he presented a claim to said association for the death claim under said certificate. Thereafter the Supreme Court, on or about July 20, 1891, among other things, ordered that the association should pay to the Clerk of Erie County, said death claim amounting to one thousand dollars, less taxable costs, and upon such payment that it be discharged from further liability 107
and that said administrator be substituted as defendant herein. The association thereupon, thereafter, on August 6, 1891, paid to the said clerk nine hundred and eighty-nine dollars and fifty-one cents and by a supplemental summons and complaint served October 7, 1891, the defendant administrator was brought in as sole defendant, and on July 16, 1892, served his answer herein.

108
Thereafter and on December 13, 1892, said Robert Talbert died intestate and thereafter Anna Maria Talbert was duly appointed and qualified as administratrix of all and singular the goods, chattels and credits which were of said Robert Talbert, and, by an order of the Supreme Court made March 3, 1893, this action was revived and continued in her name as such.

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109 Farrington, Laing & Kelly, of Buffalo were the attorneys for the original plaintiff and continued as attorneys for the plaintiff after the action was revived.

F. A. Burnham, of 150 Canal Street, New York City, was the attorney for the original defendant-association, but upon the substitution of the defendant-administrator in the place of the Association,
110 Jonathan L. Slater became and has remained the attorney for the defendant.

By an order made at Special Term July 12, 1894, the issues herein were referred to Clarence M. Bushnell, Esq. to hear, try and determine and the same were brought to trial before said referee at Buffalo on the 30th day of July, 1894, and tried before him on that day and divers adjourned days, the evi-
111 dence being finally closed on the 24th day of April, 1895.

PROCEEDINGS BEFORE THE REFEREE.

Buffalo, July 30, 1894.

Present, CLARENCE M. BUSHNELL, Esq. Referee.

Appearances: *Philip A. Laing* for the plaintiff.
112 *Marvin Smith* for the defendant.

The plaintiff offered in evidence the said certificate of membership No. 14368, in the said Mutual Reserve Fund Life Association issued to and upon the life of said William Storum. Received in evidence and marked

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PLAINTIFF'S EXHIBIT No. 1. 113

A copy of this exhibit forms a part of the supplemental complaint and is annexed thereto and will be found in the Judgment-Roll. (~~ante~~ p. 81)

The plaintiff offered in evidence an assignment of the said certificate of membership No. 14368 dated October 26th, 1883, signed "William Storum."

The defendant admits the signature "William 114
Storum" to be the signature of the defendant intestate and that the assignment was delivered to Robert Talbert in his life-time.

The plaintiff also offered in evidence the consent to this assignment appearing below the assignment dated November 2, 1883, and signed by the secretary of the association.

The defendant admits that the secretary who 115
signed the consent, was at the time he signed it, secretary of the Mutual Reserve Fund Life Association; that he was authorized by the association to sign the consent; and that written notice of the assignment was received by the association before the consent was executed.

Assignment and consent received in evidence and marked 116

PLAINTIFF'S EXHIBITS 2 AND 3.

The defendant requested the referee in writing to find certain facts and a copy of said assignment appears in full at request No. 5, (~~ante~~ p. 8169) and of said consent at request No. 6. (~~ante~~ p. 8164)

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117 The defendant asks and the plaintiff consents that James Storum and Serepta Storum, witnesses for the defendant be sworn out of order.

JAMES STORUM produced and sworn as a witness for the defendant and

Examined by Mr. Smith, testified as follows:

I am now residing in Washington. Buffalo is my
118 birth-place and legal residence. I am the defendant in this action. My age is fifty years. My father, William Storum, was the assured mentioned in the plaintiff's exhibit No. 1. He died the fifteenth day of January, 1891. He was about seventy-one or seventy-two years of age I think. He resided in Washington, with me at the time of his death, and had been for the last ten years with me as a part of my family. I am a married man and have a
119 wife and three children living now. My wife is Carrie E. Storum and she is in Washington now. I am a teacher in the public schools in Washington. I have been teaching off and on since 1870. Previous to my father going to Washington he resided here in Buffalo. He was one of the earliest settlers in Buffalo, but went to California in 1852 and was there about eleven years and then returned and
120 lived here until he came to live with me in Washington. When he was in Buffalo he was a cook and followed his business on the lakes. He had four children but two of them died about the time he went to California, so that there are but two children living, myself and my sister Serepta. My father kept house here and owned the house at 156 Pine Street. The lot was twenty-five feet front;

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the house was a cottage. He had no other prop- 121
erty besides this here. I know his earnings approximately. During the period of navigation they were from fifty to sixty dollars per month. After he went to Washington, the income he had was the rental of this property which was between twelve and fourteen dollars per month. He lived with me and had no board at all to pay. I knew Robert Talbert in his life-time. I knew him since 122
I was a small boy. He was no relation of our family. He was an intimate friend of our family. He was almost daily at my father's house, and frequently took his meals there. I think he was younger than my father. I last saw him in Washington about fifteen or eighteen days before my father's death and he was then at my house. He came to Washington to spend the holidays and was there a couple of weeks. During that time he 123
came to my house once as far as I know. On that occasion he saw my father. My father was confined to his bed. This was the time of his last sickness. My father's last attack was either the 23rd or 24th of December, 1890. He died the fifteenth day of January, 1891. I think it was an attack of paralysis, that was what the doctor called it. His mind at times wandered in the last two days before his death. About thirty-six hours probably 124
before his death, he went into a comatose state and never spoke afterwards. I had a conversation with Robert Talbert after he had seen my father at the time of his last illness, in Washington. Mr. Talbert came down from my father's room and stated that he did not think my father would recover. The conversation then turned on the subject

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125 of life insurance; the policy which my sister held, and he said that I had as much interest in that policy as my sister had. That was the conversation in general.

During the years 1887 to 1891, I resided at No. 2004 Seventeenth Street, N. W. Washington and live there yet.

126 The witness is shown a letter with its envelope post-marked Buffalo in January, 1891, and as received at Washington January 26, 1891, addressed to Mrs. Carrie E. Storum, Washington, D. C., purporting to have been written by Robert Talbert.

The witness says; This letter was addressed to my wife, I think. I think I was present when it 127 was received and we read it together. I do not know whether the letter was answered or not.

Envelope marked Defendant Exhibit No. 1, for identification.

Letter marked Defendant Exhibit No. 2, for identification.

128 The witness is shown a letter dated March 8, 1887, addressed to William Storum, purporting to have been written by Robert Talbert with its accompanying envelope postmarked Buffalo, March 9, 1887, and at Washington March 10, 1887.

The witness says: I have no recollection of being present when this letter was received. I found it among my father's papers.

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Envelope marked Defendant Exhibit 3, for identification. 129

Letter marked Defendant Exhibit 4, for identification.

The witness is shown a paper dated Buffalo, April 1, 1853, purporting to have been executed by Robert Talbert to Peyton Harris, his attorney.

The witness says: I first saw the paper among my father's papers after this action was commenced. 130

Papers marked Defendant Exhibit No. 5, for identification.

The witness is shown a mortgage dated February 7, 1852, with an indorsement thereon dated April 1, 1853, purporting to be a receipt for $200.00, paid on the mortgage. 131

The witness says: I found this among my father's papers after this action was commenced.

Papers marked Defendant Exhibit No. 6, for identification.

Cross Examined by Mr. Laing the witness

JAMES STORUM testified as follows:

I am a son of William Storum. He left no will. Robert Talbert was at my house about eighteen days before my father's death. 132

Buffalo, August 21st, 1894.

Mr. Laing appears for the plaintiff.
Mr. Smith appears for the defendant.

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133 SEREPTA STORUM, produced and sworn as a witness for the defendant, and

Examined by Mr. Smith, testified as follows:

I now live in Washington and have for fourteen years; previous to that I resided in Buffalo when I was home, I am forty-six years old. James Storum is my brother and I am a daughter of William Storum. I was in Buffalo in August, 1883, I saw
134 Robert Talbert at that time and had a talk with him in reference to insurance upon my father's life.

Question. State what that conversation was. Please?

The plaintiff objects to the evidence on the ground that (1) it is incompetent (2) immaterial (3) inadmissible under section 829 of the Code (4) that the seal
135 to the assignment is conclusive and the assignment cannot be attacked by such evidence (5) that the evidence is inadmissible under the pleadings.

By the Referee:—Decision reversed and exception to the plaintiff.

Answer. He came to see me at Mrs. Conner's at
136 146 Oak St. and wanted me to take out a policy of two thousand dollars on my father's life. I told him I was not able to pay the premium on two thousand dollars owing to my father's age. He than suggested that I take out one thousand, and he would take out another thousand and keep it up for me in consideration of the fact that years before my mother had been very kind to his wife and

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taken her in when she was turned out from her own 137
people, and her first child was born in my father's house. I took out the one thousand dollars.

Question. Afterwards did you see Mr. Talbert, again in Buffalo at the time your house was sold?

Answer. I saw him the summer the house was sold, the summer of 1887.

Question. Did you have any conversation with 138
him then in reference to the policy set forth in the complaint in this action?

Answer. I did.

Plaintiff's counsel makes same objection as above; same ruling and exception to plaintiff.

The witness continues: I asked him about his 139
policy and he said he had let it lapse.

* * * *

I never had any other conversation with him in reference to the insurance. I saw him once in Washington about the time of my father's death.

The witness is shown two letters and says they were received in Washington 140
about the time of their date by her. Letter dated April 6, 1887. marked Exhibit No. 7 for identification. Letter dated October 17th, 1887, marked Defendant's Exhibit No. 8 for identification.

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141 *Cross Examined* by Mr. Laing the witness

SEREPTA STORUM testified as follows:

Question. What did you say was the reason why Mr. Talbert took out this policy on your father's life?

Answer. He said he would take it and keep it for me.

142 Question. Well, you gave some reason for doing this?

Answer. He did it out of gratitude for my mother for the kindness she had shown his wife. Years ago their family had fallen out and she took her to her home and their first child was born at my mother's house.

143 I cannot fix the exact date of this conversation; the policy was taken out the 3rd day of August and the conversation must have been the last of July or the first of August. I have no other means of fixing the date than the date of the policy. I know nothing of his policy; I am speaking of my own policy; mine was dated the third of August, 1883. I had possession of that policy at once; it was sent to me from New York and I always re-
144 tained possession of it. I have never seen this policy in suit. All this conversation between me and Mr. Talbert was on one day; it was previous to taking out of policy and prior to August 3, 1883. I had no other conversation with him regarding the policy in suit until sometime in 1887. The conversation I had with him in 1883 was at Mrs. Conner's house

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when I was staying at 146 Oak Street. I was liv- 145
ing in Washington then and was here for my vacation. My father came with me and was in Buffalo at the time. Mrs. Conners was present at this conversation but she is now dead. The conversation in 1887 was here in Buffalo; we were comming over Clinton Street, toward Oak. No one was with us. I asked him about his policy and he said he had let it lapse; that was all that was said about the 146
policy. I understood that this was taken out for me, that was what he said.

Question. As far as you know there may have been another policy than this one taken out by Mr. Talbert for you?

Answer. All I know is what he said. I never saw the policy in suit. I saw Mr. Talbert occasionally between 1883 and 1887. I saw him when- 147
ever I came to Buffalo and he was in Washington once or twice after 1883. I did not come to Buffalo every summer, since my father's death. I came every summer before his death. I came every two years. I am accustomed to remain from a month to two months. I was on friendly terms with the Talbert family all that time; we were always friendly until we had a falling out about the property; we were always on speaking terms. When 148
I was here at those times I saw him once in a while; I stopped on Oak Street and he was around the corner. I stopped only a few rods from where he lived until about five years ago, and frequently had talks with him about other matters besides this, all sorts of matters. He was agent for my father about two or three years, since 1883, but previous

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149 to 1887, prior to father's death. I guess Mr. Talbert came to Washington two or three times. I don't just remember. I don't think he ever stayed over one winter, but he stayed one winter with my brother all winter. It must have been the winter of 1882 or 1883, I guess, but I am not certain. I don't think it was later than that. On those occasions when he was in Washington, sometimes I saw him frequently, but one time I did not see him; he
150 usually called. Father saw him on those occasions. He was as friendly with my father as any one, but never was very friendly with any one. I don't know as my father had any reason to think otherwise than a good deal of Mr. Talbert. I did, I had known him since I was a baby. When my father was in Washington he lived with my brother James. He came to Buffalo occasionally but only
151 when I brought him. When I came summers I usually brought him and he stayed while I stayed, except one fall he stayed until November. He stopped with Mr. Talbert once, with another friend once, and one summer, the last time he was here, he boarded with Mrs. Thompson. I don't think he stopped with Mr. Talbert more than one summer; he stopped there the summer he was here until fall; that was in 1883 I think, and he left in November.
152 That summer I was here until September and stayed at Mrs. Conners. I always stopped there when I came here, until she died; she died five or six years ago. After my father's death, I did not tell my brother James that this policy was taken out for him or anything of the kind. I did not know anything about this policy being taken out as a security for a loan, and I did not understand that it

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was taken out because my father owed Mr. Tal- 153
bert for $100; the mortgage was for that and the policy had nothing to do with that debt. He never helped me to keep up my policy for a time, not a cent; he never gave me any money to pay it. I corresponded with Mr. Talbert occasionally, once and a while, while he was agent for the house. I have not had any communication from him since he relinquished his agency, except when I wrote him for 154
his account with my father.

Upon *Re-Direct Examination* by Mr. Smith, the witness

SERIPTA STORUM testified as follows:

I got the account I wrote for, this was previous to and just before the selling of the property. I sent the account to Mr. Locke, who had the selling of the property. My policy was in the Mutual 155
Reserve, the same company as the policy in suit. Mr. Talbert said the policy he got out was to be in the Mutual Reserve. He solicited for the Mutual Reserve.

Re-cross Examined by Mr. Laing the witness

SERIPTA STORUM testified as follows:

I do not know that I can say that Mr. Talbert 156
told me so in so many words that the policy he had taken out for me was in the Mutual Reserve. I am sometimes called Alice S. Storum, and my father had but one daughter of that name. I have heard of the Detroit Mutual Benefit Association.

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157 Buffalo, April 23rd, 1895.

Mr. Laing appears for the plaintiff, and *Jonathan L. Slater* for the defendant.

SALLY JONES, produced and sworn in behalf of the plaintiff, and

Examined by Mr. Laing, testified as follows:

I live in Buffalo and am a sister of William
158 Storum. He died in Washington in January, 1891. Her family lived in Buffalo. He lived here a good many years before I came to Buffalo. I have been here this last time 18 years; after I came here first I was 11 years in Titusville, and before that I was in Watertown. It is nearly fifty years since my brother first came to Buffalo. I think I heard him say he was in California about 14 years. The last
159 four or five years of his life he lived in Washington. He came here while he lived in Washington three times. He'd come in the spring, go back in the fall and stay during the summer. Before he went to Washington he was living here in Buffalo for several years. The last eighteen years he lived either here in Buffalo or in Washington. While living in Buffalo he lived upon Pine Street, not a great ways from where Robert Talbert lived. Talbert
160 lived on Michigan Street part of the time, and he lived on Pine Street. His wife and daughter lived with my brother, and his son was not to home, he was off to school a good deal. His son didn't live there during the last 18 years; his daughter was with him a good part of the time. It was before she went to Washington that she lived with her father. She has been in Washington 14 years.

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After his daughter went to Washington he lived 161
alone some of the time. During the last 14 years
he lived alone a good part of the time after his
daughter left him until he went to Washington.
His health during the last 12 or 14 years was very
poor; he was not able to get about at all some of
the time. There were weeks when he had to keep
the bed all the while; he could n't get up without
help. He was not able to do much the last 12 or 162
14 years. He and Robert Talbert were always on
friendly terms since he came to Buffalo, and when
they were young men. I know they were friendly,
Robert Talbert did anything he could for him; he
helped him to get to California and helped him to
get back; he could n't have lived without him. All
of Robert Talbert's lazy time was spent at Storum's
taking care of him, doing anything that could be
done for him, fixing up the fences, painting the barn, 163
and was always busy when he was there. He got
medicines for Mr. Storum and sent them by me.
Mr. Talbert paid for the medicine. During this
time I lived very near my brother's and used to be
in there two or three times a day, and I know
Mr. Talbert was there because I saw him there.
If he was not there he would send for him; he
wanted him there when he took his medicine. After
my brother went to Washington, Mr. Talbert went 164
there and fixed up the rooms and got a stove for
him and got him started; that is what my brother
told me himself. I know Mr. Talbert paid the
taxes on the Pine Street place; he gave my brother
$30.00; whether it was ever paid back I don't
know. When his daughter was not at home Mr.
Talbert tended to everything, got in the coal. She

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was home winters and two or three years was on the lakes. When he was on the lakes Mr. Talbert did everything after Serepta went to Washington. Mr. Talbert used to be there all the time to see if he wanted anything; be back and forward two or three times a day to see if he wanted anything; he told him not to want for anything; that if he wanted anything to let him know. I know Mr. Talbert bought or sent him groceries or stuff from the market. I know every time Mr. Talbert's boys went to market they left marketing with my brother. They left anything they wanted, meat, vegetables, and whatever they wanted. Mr. Talbert used to send his meals cooked to him part of the time when his daughter was on the lakes. Every week they would be there and sometimes twice a week. When James Storum was there on a visit they would be there every day from the market. Mr. Talbert would go himself and get stuff. My brother was not able to walk and could n't go to market and he would always go himself. He left what he wanted, they would go to the cart and get what they wanted.

It would last until they went to market again. They kept him supplied with this market stuff. They used to go with a little cart; this was kept up during the last years my brother lived there. Mr. Talbert was always fixing up the place. I knew of him fixing the sidewalk and his fixing the fence, every time it was out of repair. In the way of fixing the house he did nothing more than fixing the door and keeping the house in repair and seeing that the gates were kept so that they could be opened. He painted the house, my brother told me so. He used to

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keep the clap-boards fastened on; he used to come 169
around and fix with nails and hammer and straighten and fix up every thing during the time my brother was quite helpless. Mr. Talbert used to leave his own house and go there nights and take care of him; when he was very sick Mr. Talbert was always on hand to see him. I know Mr. Talbert prepared some of his meals for him; he used to fix his meals when he was there nights. I was obliged to 170
work out during this time. Yes, I have heard my brother talk about the things Mr. Talbert did for him. The last time I saw my brother he never could have lived if it hadn't been for what Mr. Talbert did for him. He also said he owed him a debt that he didn't know one time as he could pay him, but that he had got things fixed so that he thought he could get his pay. This was the last thing he ever said to me. This was here in Buffalo, the last time 171
he was here, not a great while before he died; that was in the fall and he died in the winter. He was always speaking about Mr. Talbert; didn't know how he could get along without him; when he was here sick he didn't want to go back at all. Those summers when he came back from Washington one time he stayed at Mr. Talbert's and the other two summers he boarded at other places; Mr. Talbert
wanted him to stay with Mr. Talbert that winter 172
and he would have stayed if it had not been for his daughter.

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173 *Cross Examined* by Mr. Slater, the witness

SALLY JONES testified as follows:

I was 80 years old on the 9th day of June. My brother William was three years younger. My husband has been dead 20 years and over. I was a widow when I went to Titusville. I married Mr. Jones in Oswego. I don't remember the year I was
174 at Titusville, 11 or 12 years I believe; after leaving there I came to Buffalo and have been here ever since. I married Mr. Jones before I went to Titusville; he didn't die here, he went away among his folks and died. I have not lived with him since I came to Buffalo. I have no children that I know of; I have had children but I guess they are dead. My grand-daughter was living with me while I was living near my brothers. We two lived in the house
175 alone. She will be 40 years old in September I guess. My grand-daughter worked out when she got work and when she didn't she worked at home. She and I were at home the larger part of the time. Some of the work I did for others was done at home and some of it away from home. My brother was over to my house considerable of the time when he was able to work. He had rheumatism and there were times when he couldn't feed himself
176 or set up in bed at all. I don't know what kind of rheumatism it was. It affected him so that he couldn't help himself. He wasn't very fleshy. The rheumatism would be in his limbs and body; his hands and feet would swell up terribly. Sometimes of the year he would be about smart and sometimes he couldn't get around at all; he was generally worst in the fall and spring; it was the fall

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when he was here the last time and he had it so 177
bad. It increased as he grew older. He got so at
last he couldn't do anything. I know that he was
afflicted with rheumatism in the fall and spring
when in the summer he had been on the lakes. He
got worse with the rheumatism after his wife's
death. He kept in more and didn't get about so well
after she died. I can swear that I have been here
18 years this last time. I don't fix it from any 178
particular event or occurrence, this is my memory
of it. I can't remember exactly when I last saw
my brother but it is over three or four years ago
in the fall. His daughter was with him at that
time. I saw him every time he came up in previous
summers. Mr. Talbert was a barber. He followed
that as a trade after I returned to Buffalo for some
4 or 5 years; I should think after I returned to Buf-
falo. After those 4 or 5 years he sort of went out 179
of business, then he had leisure to be with Mr.
Storum after he went out of business. I can't tell
how old Mr. Talbert was at the time of his death.
I had no great acquaintance with Mr. Talbert ex-
cept that I used to meet him there 2 or 3 times a
day. From what I know of him I should think
him to be not over 60 years of age. He died I
guess 3 years ago this coming winter. When I
spoke of living near my brother's I refer to the 180
place he owned on Pine Street. My brother lived
last on Pine Street 11 years ago I guess. He lived
there up to the time of his going to Washington.
Then they sold the place. He didn't sell the place
until he had been in Washington a couple of years
or so. I think he was in Washington two years
before the place was sold. I don't think it was

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longer than that, it might have been. The house in which my brother lived was a very plain little house. I didn't know of my brother's owning any other property but that, and can swear he didn't own anything but that. When he was not afflicted with rheumatism he was an active, energetic man. He was very saving of his money. He was a man of good habits. I don't know much about his life while he was in California. I know when he went there and when he came back. After his return and before he went his chief occupation was that of a cook. He was brought up by a farmer. When he came here to Buffalo he took to cooking and went out on the lakes. His chief occupation both here and while in California as I understood it was that of a cook. Other than when he was afflicted with rheumatism he kept himself busy; when he had the rheumatism very bad he used his hands. When the rheumatism came on him he was generally sick for three or four weeks; it would make him weak so he couldn't get around very fast; he must have suffered a good deal when the rheumatism drew his hands out of shape. I used to go to see him as often as once a day and sometimes two or three times a day when I was not working. When his daughter was on the lakes then I used to go over and do the work for him. That work would consist of sweeping, dusting and making his bed, and Mr. Talbert was always there to see if he wanted anything. My grand-daughter didn't go over very often. Sometimes when she was idle she would run over there when I didn't go over there. She thought a great deal of her uncle, and when I couldn't go she would go when she took a notion.

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My brother didn't tell me how much money he 185
had made when he returned from California. He didn't tell me from time to time how much money he was being able to save. I had no means of knowing. I know they lived very comfortably and that is all I know about it. His wife worked hard when she was able to work, and he worked when he was able. The rheumatism came over him years before his death; I think the rheumatism came over 186
him while he was in California, being exposed there. After Mr. Storum went to Washington I think he spent three summers here. He might have been here four summers but I can only remember 3 summers. Mrs. Thompson with whom he boarded lived on Michigan Street; she kept a boarding house, number 515 Michigan Street. Mrs. Thompson is living. She lives on William Street. I know where the house is. When he came here for the summers 187
and his daughter came she would stop on Connecticut Street. Sometimes she wouldn't see him for a week. He lived with his son in Washington. I have never visited there. I have no personal knowledge of what Mr. Talbert did for him when he was in Washington, only my brother told me that if Serepta didn't come down to get coal he had to do without a fire and often he had to do without
his meals if she didn't have something for him to 188
eat. She used to buy victuals as she was coming down from school. She said Mr. Talbert got there and got him a stove and made him comfortable. Mr. Talbert got him a stove and Serepta bought the coal by the bushel. Mr. Storum was cooking on the lakes when he was able up to the time he went to Washington.

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189 Upon *Re-Direct Examination* by Mr. Laing the witness

SALLY JONES testified as follows:

For several years before he went to Washington he was pretty bad and not able to do but very little. He did not cook on the lakes right along. He went on a trip and tried to cook and the rheumatism would come on and he would have to quit it
190 and for several years before he went to Washington he wasn't able to do much of anything. I don't understand he had money laid away, I don't think he did. My understanding is that Mr. Talbert helped him because he needed help. His wife died 14 or 15 years ago.

191 Upon *Re-cross Examination* by Mr. Slater the witness

SALLY JONES testified as follows:

I don't think that my brother had any money laid aside when his wife died; Mr. Talbert paid for the burial of her. I know my brother didn't have money laid aside because he wasn't that kind of a man; he wouldn't be dependent upon any one else
192 if he had money laid aside. His place on Pine Street was worth a good deal more than he got for it; they said, I think, he got $1,900.00. The title of the property remained in my brother; he was the owner of it up to the time of its being sold. I suppose that if my brother owned a piece of property there worth $1,900.00 it would be possible for him to get what he wanted in case of necessaries during sickness.

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EMELINE COY produced and sworn as a witness 193
for the plaintiff

Examined by Mr. Laing testified as follows:

I live at 50 Potter Street, Buffalo. I knew Robert Talbert and William Storum in their life times. And I lived near where they lived in Buffalo. I have heard Mr. Storum talk about Mr. Talbert's being so kind to him and bringing him things, and, when his son's two children were visiting him from 194
Washington, Mr. Storum said he didn't know what he would have done if it hadn't been for Mr. Talbert being so kind and bringing their marketing. He didn't say what he brought him, but a little of everything. He spoke other times about Mr. Talbert's bringing him things. He said Mr. Talbert brought him medicine and gave him money to get medicine. I have seen Mr. Talbert at Mr. Storum's 195
very often. I heard Mr. Storum say that Mr. Talbert came to see what he wanted. These were the years before Mr. Storum went to Washington when he was living here in Buffalo. I heard Mr. Storum tell about Mr. Talbert's fixing the house and building on a new shed; he said Mr. Talbert built on a new shed. This was about a year before Mrs. Storum died. I think it was. I saw the shed lots of times. It was shingled and made into a room 196
better than any room in the house. It was clapboarded on the outside, floor in it, the nicest room in the house. There was a brick chimney in it. It was one story, windows in it and high ceilings. That Mr. Storum said Mr. Talbert did: he said he wasn't able to build it at that time. I heard Mr. Storum tell about his fixing the sidewalks. I went

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197 to see Mr. Storum a good deal because for more than half his time for several years he was in bed. I have been a close friend of Talbert and Storum for many years; knew both of them before they were married and went to the house frequently. I used to see Mr. Talbert's boys bringing provisions there every day. I have heard Mr. Storum say that Mr. Talbert gave him money for the taxes, but I don't know anything about how much. I
198 heard about Mr. Talbert paying the insurance on his life policy. When Mr. Storum came from California he came right to our house; his wife went after him; he was sick then with the rheumatism, and I heard him say he had no money.

Cross Examined by Mr. Slater the witness

199 EMELINE COY testified as follows:

He returned from California, I guess, about the war time, about the time it was going on, I think perhaps the war was over; I think it was. His wife went there on purpose after him; was gone about six months. They went to their house on Pine street when they returned. He owned the land before he went to California; she bought the house
200 while he was in California. She did not have money of her own; he sent her some and she worked some. When she went to California she borrowed the money to go with. The house had 4 rooms when they went to live in it after he came back. The war closed I think in '65 and it was about '70 or '71 that the shed was built on. I don't know how many times Mr. Storum told me about Mr.

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Talbert having given him money to buy medicine. 201
He spoke to me about having had money this way to buy medicine more than half a dozen times. This was the last years before he went to Washington. There were several years that at times he was unable to work any or to help himself. These statements were made to me both before and after he went to Washington to live. He spoke about Mr. Talbert's helping him; he didn't speak about borrowing any. 202 I don't know whether Mr. Storum paid Mr. Talbert back the money he advanced. For work which he did for him I don't know whether he paid him or not, or for building the shed, that I don't know. I can't say anything about whether there were any settlements between them from time to time.

203

Upon *Re-direct Examination* by Mr. Laing, the witness

EMELINE COY testified as follows:—

Mr. Storum didn't talk about these things as though he paid for them. He expressed himself as being under obligations to Mr. Talbert. He didn't talk as though he had paid for them.

204

Upon *Re-cross Examination* by Mr. Slater, the witness

EMELINE COY testified as follows:—

I didn't see him the last time he came to Buffalo, The last time that I had a talk with him was the

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first summer after he went to Washington and stayed all winter, about any work or money. That was somewhere about '86 or '87. The year that I had the conversation with him was the year that Gen. Grant died; and the year after that too. The last conversation that I had with him that I can remember was the year after Gen. Grant died; he said he liked Buffalo better than he did Washington, and he didn't know how he could ever repay Mr. Talbert for what he had done for him. This conversation took place over at the arsenal. He said that people didn't know anything about how much Mr. Talbert had been to him.

WILLIAM TALBERT produced and sworn as a witness for the plaintiff,

Examined by Mr. Laing, testified as follows:—

I am a son of Robert Talbert. Often on returning from the market my brother and I would stop with a wagon and leave things that father would buy for Mr. Storum. These were meats, vegetables, fruits, market truck. This was several years before he went to Washington. Then I have carried things direct from the house. I carried provisions direct from the house. I did a few things around there upon my father's direction. I helped lay the sidewalk. I painted or helped paint a room there. I ordered lumber sent there from Metz's. Storum had a tenant there for a while and I collected rent and paid the taxes and sent the rents collected, to Washington. I remember many of the things that

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Miss Coy and Mrs. Jones have testified to. I have 209
heard Mr. Storum to the same effect that the other witnesses have stated.

Cross-examined by Mr. Slater, the witness

WILLIAM TALBERT testified as follows:—

The people paid their rents very irregularly, some of them never paid. I sent on the rents from time 210
to time, whatever I had in my hands, after paying the taxes and bills.

Buffalo, April 24, 1895.

Mr. Laing appears for the plaintiff, and *Mr. Slater* for the defendant.

The plaintiff here offers in evidence a statement of the premiums or assess- 211
ments, etc., paid by Robert Talbert upon the Certificate or policy in suit.

It was admitted that the statement is a statement of the different sums paid the Certificate by Robert Talbert with the dates of the respective payments. The statement was received in evidence and marked.

212

PLAINTIFF'S EXHIBIT G.

The defendant requested the referee to find certain facts and he found request No. 8. (ante page 70) This finding shows the contents of this Exhibit.

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213 The plaintiff offers in evidence a printed copy of the Constitution and By Laws of the association as finally amended in 1888. Received in evidence and marked.

PLAINTIFF'S EXHIBIT H.

There is nothing in the Constitution or By Laws changing in anywise the terms or conditions of the Certificate in suit and this evidence was offered to
214 show that negative proposition.

It is admitted that the Mutual Reserve Fund Life Association was originally incorporated under chapter 267, of the laws of 1875, and was re-incorporated under chapter 175 of the laws of 1883.

Plaintiff Rests.

The defendant moves for a non-suit on the fol-
215 lowing grounds:

(1) That the plaintiff has not made out a case.

(2) The plaintiff has shown no consent of the company to the assignment of the certificate.

Motion denied. Exception to the defendant.

216 WILLIAM TALBERT recalled as a witness for the defendant, being shown certain of the defendant's exhibits marked for identification,

Examined by Mr. Slater, testified as follows:

Witness is shown envelope (marked exhibit No. 1 for identification) and says it is in his handwriting.

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Letter of January 24, 1891, (marked exhibit No. 217
2, for identification, ante page 11). Shown the witness, and the witness says; that letter is also in my handwriting; it is addressed to Mrs. Storum, the wife of James. My father did not write that letter; he always had greal difficulty in writing; he always got things in an ungrammatical manner. I very often wrote letters for him; I conducted most of his correspondence, that is, the business
correspondence. Did I write this letter for him? 218
Well, I'll tell you how that is, I wrote that letter in this way; we received a letter from Mrs. Storum stating why her husband did not come, and my father said to me, "If you like, you may answer that letter." Whether he knew anything in the letter, I do not know. Father was very annoyed; was very much put out; that was because he was not asked to act as pall-bearer at the funeral. I 219
have the letter that was written to him at that time, that is, I had it. I do not think I have it now. I think Mr. Laing has it. I gave it to him because I gave him most of the correspondence. Yes, now that I come to think of it I know he has that letter. It is hard for me to say what that letter referred to, other than the funeral and Mr. Storum's death. That was the principal part of
the letter. She went into details as to why she 220
and her husband did not come; she claimed her husband could not afford it; that Serepta would get all of the insurance; that is what James wanted to make plain to all the citizens here. In that letter she spoke about getting the insurance and to have the money to bring her here; they did not have any money; Serepta preferred to bring a

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221 friend, she wanted to bring a friend (Witness looks at letter) Yes sir; with reference to those statements I wrote those portions of this letter which refer to insurance, but that refers to the policy which was made to Serepta and which has since been paid to her. I think the statement in this letter regarding the insurance were made with my father's knowledge or direction. I remember that
222 I told him after writing the letter what I had put in it. No, I do not remember that he dictated that sentence; he did not have any reason to. He often allowed me to write letters just as I wished without dictating anything to me. He simply directed me to answer such letters for him. He directed me to answer this letter for him. I certainly was familiar at that time with the matter of the insurance taken out by my father on the life of Mr.
223 Storum.

Question. And by reason of your familiarity your father knew that you would be able to answer this letter?

Objected to by plaintiff; objection sussustained.
Exception to defendant.

224 In this instance he gave me no explicit instructions; he did just as he ordinarily did; he just asked me to write. In reading the letter from Mrs. Storum I wrote in answer to matters brought up by it.

The letter was offered in evidence and the plaintiff objected upon the ground that it does not appear; that Robert

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Talbert knew what was in it; objection 225
overruled; exception to plaintiff; letter
received in evidence and marked

DEFENDANT'S EXHIBIT No. 2.

(This letter is written upon two sheets
of small note paper, the first sheet on
both sides; the lower corners of the first
sheet are torn and the missing words 226
and letters are indicated by dashes in
the following copy.)

98 Clinton Street, Buffalo, January 24, 1891.
MRS. STORUM.

Dear Madam: I am in receipt of yours of Jan. 18th and will reply as follows: Mr. Storum was buried from the church last Sunday at 2:30; the church was well filled, and many were without 237 seats. Rev. Quarter officiated assisted by Rev's Peck and Talbert. The bearers were Mr. Lloyd, Henry, Walker, Granby, a stranger and myself. The remains were put in the vault, and the interment took place Wednesday noon.

I did not see Serepta to speak with her.....alled on other friends, but not.....t knows her reasons for s..... It was only by much persuasion that 228 I got Mr. Storum's consent to have him insured, and as Serepta would not take it out, he, in consideration of the many favors I done for him, made me a party to the same.

As I understand it, James is as much a beneficiary as Serepta after the expenses are paid.

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229 Had you sent the children's books to me every year I would have had the interest made for the successive years. I don't think Serepta could draw their money; had she spoken to me I would have given whatever assistance might have been necessary, as I happened to be acting as agt. for them. Not caring to be mixed up in your ..... Serepta's disputes I have noth..... to say.

230 I hope your mother, that was ill while I was in your city, is at present much better. The members of the family send regards to you all and I likewise.

Yours etc.,
ROB'T. TALBERT.

Witness is shown envelope (marked exhibit No. 3 for identification) and says that it is in his mother's hand-writing,
231 and that she sometimes but very seldom wrote letters for his father.
It was admitted that the letter of March 8, 1887, (marked exhibit No. 4 for identification, ante p. 33) it is the hand-writing and was written by the mother of the witness for Mr. Robert Talbert. The defendant offers the letter in evidence;
232 objected to as immaterial; objection overruled; exception to the plaintiff.
Letter received in evidence and marked

DEFENDANT'S EXHIBIT No. 4.

And of the same the following is a copy:

Buffalo, March 8, 1887.

MR. WM. STORUM.

Dear Sir: I see by an agent that you are going

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to sell your place here. Property is rising in value 233
very fast in that locality, the city has bought Bennets property and paid $125,000 for it. A man has been to see me and wanted to pay half down and half on time. I told him I had nothing to do with it, that you had an agent, on the south side of Clinton St. Shephard has bought those houses below his shop and is going to build east of his shop, you can buy one of those houses for $200.00, 234
if they are not sold already. One of those houses is a splendid big house which would bring $22. a month after it got on the ground. It would cost about fifty or sixty dollars to move the house on the lot, the house has a veranda in front, it is a long two-story house about seventy or eighty feet long, it is a stylish house and not very old, between four and five hundred dollars would fix the house up in fine style and bring the water in also. I think 235
that would be a better investment than in Washington. Where your property is located here, it is right in the heart of the city and you do not have to ride to go to Main St. and the post office. Where a colored man owns a piece of property in Washington he has to go out of creation to get to it, unless he pays a high price for it. If he goes to church he has to ride, and when he goes back
it is the same. Admitting that the taxes are higher 236
here than there, you can get more money out of your property here. I told your daughter before she went away that I would not have anything to do with the property unless I could manage it the way I thought best, and she said I could not have anything to do with it unless I managed it

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237 the way she wanted it. If I had hold of the property I think you would have had better luck with it than you have had, by the time a lawyer takes out five per cent. for selling and twenty dollars for a search, and five dollars for a deed, you would have a large bill to pay the lawyer. If I had the management of the property I would suggest that you buy the house, I would mortgage the property for five hundred dollars, you could pay off the
238 mortgage gradually, and then you would have more to live on than you have now. I hear that you are offering the property for $1700. I don't know on what conditeins. With those improvements I think that in a short time you can get $3,000 for it. This letter is confidential; don't say anything to Serepta about what I said. If she wants to give the property away is none of my
239 business. My wife sends her regards to you and all the family, likewise myself. I may be down on the 16th of this month if nothing happens. I will stop with Mrs. Hains if I go, I don't know whether I shall see you or not, as I am not going to stay but a few days. I will come down on the excursion train, and ten days is all the time that we will have in Washington. We have very pleasant weather here now, the snow is all gone, From ac-
240 counts, we have had better weather here than you have had in Washington, no more at present, I remain, Yours with respect,

ROBERT TALBERT.

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The man I saw would give $1800 for the prop- 241
erty, half down and the balance in three years. There has been several after me to buy the property, but I told them I had nothing to do with it. Serepta said to me that she wanted a statement when she was here, I was very busy building at that time and could not attend to it, and I told her I could send the statement, and she was writing to me at different times to send it, that she 242
wanted to pay some on it from time to time. Will send her the statement, and he said that it was all wrong. I don't want to cheat you out of anything. If there was anything wrong I would make it all right. I think though that Will understands what he is doing.

The defendant exhibit No. 6, for identification (ante p. 35) was offered and received in evidence and marked 243

DEFENDANT'S EXHIBIT No. 6.

This exhibit is a mortgage bearing date February 7, 1852, recorded in the Erie County Clerk's office February 26, 1852, in liber 89 at page 163, executed by William Storum to Robert Talbert upon his Pine Street property in Buffalo, 25x 119 feet, to secure the payment of $250, 244
and interest.

An endorsement thereon shows a payment by Mr. William Storum, in April 1, 1853, of $200.

Two discharge of mortgage, each executed by Robert Talbert, each dated April 7, 1887, and each recorded April

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245 29, 1887, in the Erie County Clerk's office were here, by the defendant offered and received in evidence and marked exhibits 7 and 8 respectively.

DEFENDANT'S EXHIBIT No. 7.

This exhibit certifies to the redemption, payment, satisfaction and discharge of the mortgage appear-
246 ing as Defendant's Exhibit No. 6.

DEFENDANT'S EXHIBIT No. 8.

This Exhibit certifies to the redemption, payment, satisfaction and discharge of a mortgage, executed by William Storum to Robert Talbert to secure $100. dated May 2, 1878, and recorded in
247 the Erie County Clerk's Office that day, in liber 332, at page 405.

Cross Examined by Mr. Laing, the witness

WILLIAM TALBERT testified as follows:—

Yes, I told my father that I had written the letter on January 24, 1891, (Exhibit 2), that is,
248 after I wrote the letter I told my father I had written it. No sir, I do not remember saying that I had written about the insurance Serepta Storum had; I did not say that I told him about that, about the insurance. Yes, I remember the reference I made to the insurance in this letter; that had no reference to the policy in suit. I do not remember telling father that I did or did not write about the insurance.

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Plaintiff moves to strike out Exhibit No. 2, on the ground that it does not appear that Robert Talbert knew anything about it. Motion denied. Exception to plaintiff. 249

Upon *Re-direct Examination* by Mr. Slater the witness

WILLIAM TALBERT testified as follows:— 250

Question. Were Serepta Storum and James and your father to be benefitted by the same policy?

Objected to as incompetent, immaterial, and that it is not the best evidence. Objection overruled. Exception to plaintiff.

Answer. I know that there was two policies, that is I know two policies were made, one for Serepta and one for James. James refused to carry his and Serepta accepted the other one. The one that James refused to carry was the one assigned to my father. 251

The policy which was assigned to my father and of which I have first testified is the one now in suit. Serepta and James participated in the policy Serepta held, my father did not. 252

Question. When you wrote as you did, "and as Serepta would not take it all, he, in consideration of the many favors I done for him, made me a party to the same," refers to your father having been made a party to one of the policies.

Answer. I understood that Serepta was asked

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253 to carry the second policy and she then refused. I cannot say that by reason of her refusing and James refusing to carry it, it was then assigned to my father. I do not know that, that was the conversation between Storum and my father. When I wrote about father being made a "party to the same" I referred to the policy he held, the one on which he had been paying the premiums, which is the one in suit. In writing this letter I probably
254 referred to the policy which was held payable to Serepta, and also to the one payable to my father. The meaning depends upon the punctuation. If the third line read "and as Storum would not take the second one" and the fifth line "made him a party to the second one" it would have expressed my meaning. "As Serepta would not take it all" referred to the insurance covered by the two poli-
255 cies.

Upon *Re-cross Examination* by Mr. Laing, the witness

WILLIAM TALBERT testified as follows:—

In the expression in this letter (exhibit No. 2) "as I understand it James is as much a beneficiary
256 as Serepta, after the expenses are paid. "I refer to the policy held by Serepta and not to the policy held by my father. All these ideas are mine; I always arrange the letters to suit myself, my knowledge of these insurance policies is almost wholly from hearsay.

Plaintiff's counsel moves to strike out the entire testimony of witness; motion

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denied; exception to the plaintiff. Plain- 257
tiff's counsel moves to strike out the evidence of Serepta Storum of the conversation had between her and Robert Talbert on the ground that it is incompetent, immaterial, inadmissible under section 829 of the code; that the seal of the assignment is conclusive and that the assignment cannot be attacked by 258
such evidence; that the evidence is inadmissible under the pleadings.

This motion refers to the evidence given in proceedings of August 21st, 1894, beginning at the question "State what that conversation was, please? and concluding with the words "Said he let it lapse" indicated by and included by stars in the evidence of the witness (ante P. 35) 259

Motion granted; exception to defendant.
Defendant' Rests, Plaintiff's Rests.
Evidence Closed.

The foregoing contains and includes all the evidence given upon the trial and shows all the proceedings thereupon. Case settled.

C. M. BUSHNELL,
Referee. 260

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261 SUPREME COURT, ERIE COUNTY.

ANNA MARIA TALBERT, as administratrix of etc. of Robert Talbert, deceased.
against
JAMES STORUM as administrator of etc. of William Storum, deceased.

It is hereby stipulated by and between the attor-
262 neys for the respective parties herein that defendant's exhibit No. 6 is a Mortgage from William Storum to Robert Talbert, for $250.00 and dated February 7th, 1852, and recorded in Erie County Clerk's Office, in liber 89 of Mortgages at page 163, on February 26th, 1852, at 12 M., and covering lot No. 108, the same being on the West Side of Pine Street, 175 feet northerly from the North line
263 of Clinton Street, and being 25 feet in front and rear by 119 feet in depth.

And that defendant's exhibit No. 7 is a discharge of the above Mortgage and, dated April 7th, 1887, and recorded in Erie County Clerk's Office, on the 29th day of April, 1887, at 11.15 o'clock A. M., in liber 472 of Discharges of Mortgages at page 333.

And that defendant's exhibit No. 8 is a discharge
264 of a mortgage bearieg date May 2nd, 1878, for $100.00, and recorded in Erie County Clerk,s Office in liber 332 of Mortgages at page 405, May 2nd, 1878 at 1 P. M., which Discharge is dated the 7th day of April, 1887, and recorded in the Erie County Clerk,s Office April 29th, 1897, at 11:15 o,clock A. M., in liber 472 of Discharges of Mortgages at page 334.

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And it is further stipulated that the foregoing 265
stipulations may be printed in the case containing exceptions in and in the place and stead of and have the same force and effect as the original mortgage and the two dischaages.

Dated January 2nd, 1896.

PHILIP A. LAING,
Attorney for Plaintiff.
266
J. L. SLATER,
Attorney for Defendant.

SUPREME COURT, ERIE COUNTY.

ANNA MARIA TALBERT, as administratrix of etc., Robert Talbert, deceased, *Plaintiff.*

against

JAMES STORUM, as administrator of etc., William Storum, deceased. *Defendant.*

267

The defendant administrator requests the referee to find the following:

268

FACTS.

1. That the Mutual Reserve Fund Life Association was originally incorporated under Chapter 267 of the laws of 1875 and was reincorporated under Chapter 175 of the laws of 1883.

Found C. M. B.

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269 2. That on or about the day of its date the Mutual Reserve Fund Life Association issued to William Storum its "Certificate of Membership" number 14,368, sealed with its seal at the City of New York on the seventh day of August, 1883, wherein and whereby, among other things, it undertook, within ninety days after receipt of satisfactory evidence to the Association of the death of said William Storum, during the continuance of
270 said certificate to pay "to the legal representatives of William Storum (self) of Washington, District of Columbia, United States of America, the sum of one thousand dollars from the death fund of the Association at the time of said death, or from any moneys that shall be realized by the said fund from the next assessment to be made" as therein set forth.

271 Found C. M. B.

3. That in said certificate it was expressly provided that "This certificate is not binding until the first payments due thereunder have been fully received in cash by the Association, or by some agent authorized to receive the same, and during the life of said member."

272 Found C. M. B.

4. That in said certificate it was expressly provided that "written notice of all assignments to be valid must be received and approved by the association; and the beneficiary or assignee must possess an insurable interest in the number equal to the amount assigned."

Found. C. M. B.

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5. That on or about the day of its date William 273
Storum executed a paper writing, sealed with his seal, of which the following is a copy, to wit:—

No. 14368. ASSIGNMENT. $1000.00

Assignment of Certificate.

"MUTUAL RESERVE FUND LIFE ASSOCIATION,
New York.

For value received, I do hereby assign, transfer, 274
and set over unto Robert Talbert of Buffalo, N. Y. the above named Certificate of Membership and all sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, or to be had or made by virtue thereof; to have and to hold unto the said Robert Talbert.

In witness whereof I have hereunto set my hand and seal this 26th day of October, one 275
thousand eight hundred and eighty-three.

[L.S.] WILLIAM STORUM.

Executed and delivered in presence of Michael Weidrich.

Found. C. M. B.

6. That following said assignment and written below the same appears the following writing to wit:— 276

The "Mutual Reserve Fund Life Association" hereby consent to the above assignment, subject to the conditions of the certificate.

F. F. BARNAN, Secty.

New York, November 2, 1883.

Found. C. M. B.

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277 7. That said assignment and consent are partly written and partly printed and executed upon "blank forms."

8. That at Washington, D. C., on the fifteenth day of January, 1891, William Storum, at about the age of seventy years, died intestate.

Found. C. M. B.

278 9. That said Robert Talbert paid to the said Mutual Reserve Fund Life Association, because of the membership therein of said William Storum and the said certificate of such membership, dues, fees, premiums and assessments as follows:

1883,	Aug. 3,	$8.00	Aug. 3,	$2.00	Oct. 3,	$5.50
	Dec. 3,	5.50				
1884,	Feb. 3,	5.50	April,	5.50	June,	5.50
279	August,	5.50	August,	2.00	Oct.	5.50
	Dec.	5.50				
1885,	Feb.	5.50	April,	5.50	June,	11.00
	August,	5.50	August,	2.00	Oct.	5.50
	Dec.	8.25				
1886,	Feb.	5.50	April,	8.25	June,	8.25
	August,	2.00	Oct.	8.25	Dec.	8.25
1887,	Feb.	8.25	April,	8.25	June,	8.25
	August,	6.88	August,	2.00	Oct.	8.25
280	Dec.	8.25				
1888,	Feb.	8.25	April,	8.25	June,	8.25
	August.	8.25	August,	2.00	Oct.	8.25
	Dec.	8.25				
1889,	Feb.	8.25	April,	8.25	June,	8.25
	August,	8.25	August,	2.00	Oct.	8.25
	Dec.	8.25				

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1890,	Feb.	8.25	April,	8.25	June,	8.25	281
	August,	8.25	August,	2.00	Oct.	8.25	
	Dec.	8.25					

Amounting in all to $349.88.

Found C. M. B.

10. That prior to said assignment to him said Robert Talbert and at the time thereof said Robert Talbert had only paid upon said certificate and be- 282
cause of said membership the aggregate of fifteen dollars and fifty cents, being the original membership fee of eight dollars and annual dues two dollars paid August 3, 1883; and a $5.50 assessment paid October 3, 1883.

Found C. M. B.

11. That the said William Storum and the said Robert Talbert, were in no wise related. 283

Found. C. M. B.

12. That there was other insurance upon the life of William Storum in which Alice Serepta Storum, a daughter of said William Storum was the beneficiary.

Found C. M. B.

13. That after the death of said William Storum 284
and on the twenty-fourth day of January, 1891, the son of Robert Talbert with his father's approbation, wrote Carrie E. Storum, the wife of the defendant-administrator a letter, which she received signed "Robert Talbert," in which, referring to the certificate of membership number 14368 in the Mutual Reserve Fund Life Association, he was

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285 made to say that, "It was only by much persuasion that I got Mr. Storum's consent to have him insured, and as Serepta would not take it all, he, in consideration of the many favors I done for him, made me a party to the same."

Not Found C. M. B.

14. That in his lifetime said William Storum executed to Robert Talbert two certain mortgages
286 upon lands in Buffalo, one dated February 7, 1852 (Defendant's Ex. No. 6) to secure two hundred and fifty dollars, recorded in Erie County, February 26, 1852 in liber 89 at page 163; one dated May 2, 1878, to secure one hundred dollars, recorded in Erie County, May 2, 1878, in liber 332 at page 402, but it does not appear that the certificate of membership number 14,368 assigned to Robert
287 Talbert or that such assignment was intended as security for these debts and these mortgages were discharged April 7, 1887 (Defendant's Exhibit Nos. 7 and 8.)

Found C. M. B.

15. That though some years younger, said Robert Talbert and said William Storum were upon friendly and intimate terms for years and
288 William Storum depended upon him somewhat for advice and assistance but it does not appear that at the time of the assignment of said certificate said William Storum was indebted to said Robert Talbert other than because of said two mortgages.

Not Found C. M. B.

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16. That on or about the seventh day of April, 289
1887, the date of the discharge of said two mortgages said William Storum and Robert Talbert came to a settlement of their affairs and any and all debts owing by said William Storum to said Robert Talbert were fully paid, except such debt as there may have been owing because of the payments by said Robert Talbert of fees, assessments, premiums and dues upon said certificate so assigned 290
to him.

Not Found C. M. B.

17. That on the twenty-sixth day of October, 1883 the date of said assignment, the said Robert Talbert did not possess an insurable interest in the said William Storum equal to the amount assigned, nor did he possess such an interest on the second day of November, 1883.

291

Not Found C. M. B.

18. That at no time did said Robert Talbert possess an insurable interest in said William Storum equal to the amount assigned by the said assignment of October 26, 1883, executed by said William Storum.

Not Found C. M. B.

19. That it does not appear that the said as- 292
signment had any other or further consideration than the premiums, dues, assessments and fees so paid or thereafter paid by said Robert Talbert to the Mutual Reserve Fund Life Association.

Not Found C. M. B.

20. That this action was originally brought by Robert Talbert against the Mutual Reserve Fund

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293 Life Association and the summons was served on or about the sixth day of May, 1891; that the said association duly appeared and demanded service of the complaint, a copy of which was duly served; that in the meantime the defendant James Storum, was duly appointed administrator of the goods, chattels and credits of said William Storum by the proper court or officials in the
294 District of Columbia; that after such appointment the defendant-administrator presented a claim to said Association for the death claim under said certificate number 14,368; thereafter this court, on or about the twentieth day of July, 1891, among other things, ordered that the Association should pay to the Clerk of Erie County said death claim amounting to one thousand dollars, less taxable costs, and upon such payment that it be discharged
295 from further liability, and that the defendant-administrator be substituted as defendant herein; that said association thereupon thereafter paid to said Clerk the sum of nine hundred and eighty-nine dollars and fifty-one cents and by a supplemental summons and complaint the defendant-administrator was brought in as sole defendant herein; that thereafter said Robert Talbert died intestate and thereafter Anna Maria Talbert was duly ap-
296 pointed and qualified as administratrix of all and singular the goods, chattels and credits which were of said Robert Talbert, and by an order of this court, this action was revived and continued in her name as such.

Found C. M. B.

C. M. BUSHNELL,

Referee.

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SUPREME COURT, ERIE COUNTY. 297

ANNA MARIA TALBERT as administratrix, etc.,

against

JAMES STORUM as administrator, etc.

To the Supreme Court:

I, CLARENCE M. BUSHNELL, the referee named in 298
the order made herein July 12th, 1894, by which the above entitled action and all the issues therein were referred to me to hear, try and determine the same, do respectfully report:

That I have been attended by the parties to this action and their respective counsel, and, having taken and subscribed the oath prescribed by law, I have heard the proofs and allegations of the respec- 299
tive parties, and from the pleadings and such proofs and allegations, I find and decide as

MATTERS OF FACT.

First.—That the Mutual Reserve Fund Life Association was originally incorporated under Chapter 267 of the laws of 1875 and was reincorporated under Chapter 175 of the laws of 1883. 300

Second.—That on or about the day August 17th, 1883, the Mutual Reserve Fund Life Association issued to William Storum its "Certificate of Membership" number 14,368, sealed with its seal at the City of New York on the seventh day of August, 1883, wherein and whereby, among other things, it

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undertook, within ninety days after receipt of satisfactory evidence to the Association of the death of said William Storum, during the continuance of said certificate to pay "to the legal representatives of William Storum (self) of Washington, District of Columbia, United States of America, the sum of one thousand dollars from the death fund of the Association at the time of said death, or from any moneys that shall be realized by the said fund from the next assessment to be made" as therein set forth.

Third.—That in said certificate it was expressly provided that "This certificate is not binding until the first payments due thereunder have been fully received in cash by the Association, or by some agent authorized to receive the same, and during the life of said member."

Fourth.—That in said certificate it was expressly provided that "written notice of all assignments to be valid must be received and approved by the association; and the beneficiary or assignee must possess an insurable interest in the number equal to the amount assigned."

Fifth.—That on or about the day of its date William Storum executed a paper writing, sealed with his seal, of which the following is a copy, to wit:—

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No. 14368. ASSIGNMENT. $1000.00 305

Assignment of Certificate.

"MUTUAL RESERVE FUND LIFE ASSOCIATION,
New York.

For value received, I do hereby assign, transfer, and set over unto Robert Talbert of Buffalo, N. Y. the above named Certificate of Membership and all sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, or to 306 be had or made by virtue thereof; to have and to hold unto the said Robert Talbert.

In witness whereof I have hereunto set my hand and seal this 26th day of October, one thousand eight hundred and eighty-three.

[L.S.] WILLIAM STORUM.

Executed and delivered in presence of Michael 307 Weidrich.

Sixth.—That following said assignment and written below the same appears the following writing to wit:—

The "Mutual Reserve Fund Life Association" hereby consent to the above assignment, subject to the conditions of the certificate.

308

F. F. BARNAN, Secty.

New York, November 2, 1883.

Seventh.—That written notice of said assignment was received by said company before said consent was executed and that said consent was duly made and executed by said company.

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309 *Eighth.*—That at Washington, D. C., on the fifteenth day of January, 1891, William Storum, at about the age of seventy years, died intestate.

Ninth.—That in pursuance of said assignment said certificate and the assignment thereof aforesaid were at about the date of the same delivered to said Robert Talbert and he had possession of the same with the consent of said William Storum un-
310 til the death of the latter.

Tenth.—That the said Robert Talbert paid to said Mutual Reserve Fund Life Association on acconnt of said certificate, at or about the date set opposite the respective amount for dues, fees, premiums and assessments, the following sums of money, to wit:—

311	1883,	Aug. 3,	$8.00	Aug. 3,	$2.00	Oct. 3,	$5.50
		Dec. 3,	5.50				
	1884,	Feb. 3,	5.50	April,	5.50	June,	5.50
		August,	5.50	August,	2.00	Oct.	5.50
		Dec.	5.50				
	1885,	Feb.	5.50	April,	8.50	June,	11.00
		August,	5.50	August,	2.00	Oct.	5.50
		Dec.	8.25				
	1886,	Feb.	5.50	April,	8.25	June,	8.25
312		August,	2.00	Oct.	8.25	Dec.	8.25
	1887,	Feb.	8.25	April,	8.25	June,	8.25
		August,	6.88	August,	2.00	Oct.	8.25
		Dec.	8.25				
	1888,	Feb.	8.25	April,	8.25	June,	8.25
		August.	8.25	August,	2.00	Oct.	8.25
		Dec.	8.25				

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1889,	Feb.	8.25	April,	8.25	June,	8.25	313
	August,	8.25	August,	2.00	Oct.	8.25	
	Dec.	8.25					
1890,	Feb.	8.25	April,	8.25	June,	8.25	
	August,	8.25	August,	2.00	Oct.	8.25	
	Dec.	8.25					

Amounting in all to $349.88.

Eleventh.—That at the time of said assignment and for some time prior thereto, the said William 314
Storum was indebted to said Robert Talbert on account of money loaned, labor and services, provisions, goods, merchandise and medicines furnished, to a considerable amount.

Twelfth.—That Robert Talbert and William Storum for many years prior to the latter's death were intimate friends.

315

Thirteenth.—That on the 26th day of October, 1883, the date of said assignment, the said Robert Talbert did possess an insurable interest in the said William Storum equal to the amount thereby assigned.

Fourteenth.—That this action was originally brought by Robert Talbert against the Mutual Reserve Fund Life Association and the summons was served on 316
or about the sixth day of May, 1891; that the said association duly appeared and demanded service of the complaint, a copy of which was duly served; that in the meantime the defendant James Storum, was duly appointed administrator of the goods, chattels and credits of said William Storum by the proper court or officials in the District of Columbia; that after such appointment

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317 the defendant-administrator presented a claim to said Association for the death claim under said certificate number 14,368; thereafter this court, on or about the twentieth day of July, 1891, among other things, ordered that the Association pay to the Clerk of Erie County said death claim amounting to one thousand dollars, less taxable costs, and upon such payment that it be discharged from further liability, and that the defendant-ad-
318 ministrator be substituted as defendant herein; that said association thereupon thereafter paid to said Clerk the sum of nine hundred and eighty-nine dollars and fifty-one cents and by a supplemental summons and complaint the defendant-administrator was brought in as sole defendant herein; that thereafter said Robert Talbert died intestate and thereafter Anna Maria Talbert was duly ap-
319 pointed and qualified as administratrix of all and singular the goods, chattels and credits which were of said Robert Talbert, and by an order of this court, this action was revived and continued in her name as such.

CONCLUSION OF LAW.

That the plaintiff is entitled by judgment for all the moneys so paid into Court, with costs against
320 the defendant.

Let judgment be entered accordingly.

Dated Buffalo, N. Y., June 11, 1895.

C. M. BUSHNELL,

Referee.

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SUPREME COURT, ERIE COUNTY. 321

ANNA MARIA TALBERT as administratrix, ect.,
against
JAMES STORUM as administrator, etc.

The defendant hereby gives notice that he excepts to the rulings of the referee herein upon the questions of law in the above entitled action contained 322
in his written decision as follows:

1. To the eleventh "matter of fact" and all thereof, in that finding is without any evidence tending to sustain it.

2. To the thirteenth "matter of fact" and all thereof, in that said finding is without any evidence tending to sustain it. 323

J. L. SLATER,
Defendant's Attorney,
105 Erie Co. Savings Bank Building,
Buffalo, N. Y.

SUPREME COURT, ERIE COUNTY.

ANNA MARIA TALBERT, as administratrix, etc., 324
against
JAMES STORUM as administrator, etc.

Whereas this action was brought by Robert Talbert against the Mutual Reserve Fund Life

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325 Association, to recover the sum of one thousand ($1,000.00) dollars, upon a certificate of insurance issued by said Mutual Reserve Fund Life Association, and whereas by an order made at a special term of this court, held at the City and Connty Hall, in the City of Buffalo, N. Y., July 20th, 1891, it was ordered that said defendant association on payment to the Clerk of Erie County, of the sum
326 of $1,000 less the amount of said defendant association's taxable costs, be discharged and released from further liability to said plaintiff Robert Talbert and to said James Storum as administrator of the estate of William Storum, deceased, by reason ofthe matters alleged in the complaint in this action, and by which it was further ordered, that said James Storum as such administrator be substituted as defendant herein in place and stead of said Mu-
327 tual Reserve Fund Life Association:

And whereas pursuant to said order said Mutual Reserve Fund Life Association did on August 6, 1891, pay to Charles A. Orr, Esq., Clerk of Erie County said sum of $1,000, less $10.50 costs or the sum of $989.50, which sum was thereupon pursuant to said order deposited in this court, to the credit of this action, subject to the judgment
328 or order of this court:

And whereas thereafter and before the trial of this action, said Robert Talbert having died; and whereas thereafter and before the trial of this action, said Anna Maria Talbert having been duly appointed administratrix of his estate and she having been duly qualified as such, and by an order of

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the Court duly made, this action having been re- 329
vived and continued in the name of said Anna Maria Talbert as such administratrix, as plaintiff herein:

And thereafter this action having been referred to Clarence M. Bushnell, Esq., attorney at law, to hear, try and determine the same, and the action having been brought to trial before said referee, and said referee after hearing the proofs and alle- 330
gations of the parties, and after due deliberation thereon, having on the 11th day of June, 1895, rendered his decision in favor of the plaintiff, and that plaintiff is entitled to judgment for all the moneys paid into court, as aforesaid, and for costs against the defendant:

Now on motion of Farrington, Laing and Kelly, attorneys for plaintiff. 331

It is adjudged, that at the time of the commencement of this action, said Robert Talbert, deceased, was the owner of the insurance certificate described in the complaint in this action, and entitled to the moneys due thereon, and was at the time of his death entitled to said sum of $989.50, paid into court, as aforesaid, with accrued interest thereon, and that the plaintiff herein upon her appointment 332
as administratrix, as aforesaid, became and now is entitled to the same moneys.

That said Clerk of Erie County pay to said plaintiff or her attorneys, said sum of $989.50 with interest thereon to date of payment.

That plaintiff recover of defendant the sum of $257.47, her costs and disbursements as taxed.

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333 SUPREME COURT, ERIE COUNTY.

ANNA MARIA TALBERT as administratrix, etc.,
against
JAMES STORUM as administrator, etc.

Take notice that the Defendant appeals upon questions of Law, and upon the Facts, to the
334 general term of the Supreme Court, Fifth Department, from the final judgment entered in this action on the 3rd day of August, 1895, in the office of the Clerk of the County of Erie.

Buffalo, September 21st, 1895.

J. L. SLATER,
Defendant's and Appellant's Attorney.

To PHILIP A. LAING, ESQ.,
Plaintiff's and Respondent's Attorney,
335 and to the CLERK of Erie County.

It is hereby stipulated by and between the parties to this action, that the foregoing annexed copies of the pleadings, original and other papers herein, are correct transcripts of and from the original of the said papers.

That the said foregoing papers on appeal em-
336 brace all the papers used in this action in which a judgment was rendered for the plaintiff and from which this appeal was taken.

Dated Buffalo, November 11th, 1895.

PHILIP A. LAING,
Attorney for Respondent.
J. L. SLATER,
Attorney for Appellant.

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Supreme Court—Appellate Division

FOURTH DEPARTMENT.

ANNA MARIA TALBERT,

As Administratrix, etc.

AGAINST

JAMES STORUM,

As Administrator, etc.

Appellant's Brief.

STATEMENT.

Robert Talbert, the plaintiff's intestate, was in his lifetime employed by the Mutual Reserve Fund Life Association as one of its agents in the city of Buffalo to procure insurance. William Storum, the defendant's intestate, and Robert Talbert, were for many years on very friendly terms. On or about August 17th, 1883, Robert Talbert procured insurance in said company upon the life of said William Storum, and a certificate of membership was issued. The evidence does not show that William Storum requested Talbert

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to effect this insurance. The first and all subsequent premiums were paid by Talbert, who, on or about October 26th, 1883, nine days after the date of the certificate, was made assignee of all the interest, benefit and advantage thereunder. Upon the death of Storum demand for the full amount of the certificate was made upon the company by Talbert, as assignee, and payment to him was refused. Accordingly suit was brought by Talbert against said Mutual Reserve Fund Life Association to enforce the certificate. About that time the representatives of William Storum also filed a claim with said company for the full amount of insurance. The insurance company applied to the court that the representatives of William Storum be interpleaded in its place. Thereupon an order was granted and entered directing the insurance company to pay the money to the County Treasurer of Erie County, which it did, and substituting the present defendant as defendant in place of the company. Hence the present suit.

POINT I.

That it was essential to the plaintiff's right of recovery that he not only plead but prove, as assignee of the certificate, an interest therein equal to the amount assigned.

The certificate itself, at Fol. 36, provides that "the beneficiary or assignee MUST possess an insurable interest in the above named number, equal to the amount assigned."

The assignee (Robert Talbert) was bound and gov-

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erned by the provisions and conditions in the certificate contained.

National Mutual Aid Society vs. Lupold, 101 Pa. St., 111.
Sanger vs. Rothschild, 123 N. Y., 577.
Hellenberg vs. District No. 1, 94 N. Y., 580.
Bown vs. Catholic Mutual Benefit, 33 Hun, 263.
Kehlenbeck vs. Logeman, 10 Daly, 447.
Sabin vs. Phinney, 134 N. Y., 423.
Ruse vs. Mutual Benefit, 23 N. Y., 516, 527.
Alabama Gold Life Insurance Company vs. Mobile Mutual Insurance Co., 81 Ala., 329.

POINT II.

That the referee erred in finding as a matter of fact (Finding 11, fol. 314)

A. "That at the time of said assignment and for some time prior thereto, the said William Storum was indebted to said Robert Talbert on account of money loaned, labor and services, provisions, goods, merchandise and medicines furnished, to a considerable amount."

B. That the referee erred in finding as a matter of fact (Finding 13, fol. 315) "That on the 26th day of October, 1883, the date of said assignment, the said Robert Talbert did possess an insurable interest in the said William Storum equal to the amount assigned."

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To each of these findings of fact the appellant duly excepted (fols. 322, 323) in that said findings and each and both of them was without any evidence tending to sustain it.

The following is a summary of the evidence bearing upon the insurable interest possessed by said Robert Talbert in the number assigned:

Sally Jones, at fol. 162, testified, "All of Robert Talbert's lazy time was spent at Storum's taking care of him, doing anything that could be done for him, fixing up the fence, painting the barn, and was always busy when he was there. He got medicine for Mr. Storum and sent them by me; Mr. Talbert paid for the medicine."

And at fol. 164, "Mr. Talbert gave my brother $30; whether it was ever paid back I don't know."

And at fol. 165, "I know Mr. Talbert bought or sent him groceries or stuff from the market. I know every time Mr. Talbert's boys went to the market they left marketing with my brother. They left anything they wanted, meats, vegetables and whatever they wanted."

And at fol. 167, "My brother was not able to walk and couldn't go to market."

And at fol. 168, "I know of him (Talbert) fixing the sidewalk and his fixing the fence every time it was out of repair. In the way of fixing the house he did nothing more than fixing the door and keeping the house in repair and seeing that the gates were kept so that they could be opened."

And at fol. 183, "I used to go and see him (Storum) as often as once a day and sometimes two or three times a day when I was not working. When his

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daughter was on the lakes then I used to go over and do the work for him."

And at fol. 185, "My brother did not tell me how much money he had when he returned from California; he did not tell me from time to time how much money he was being able to save. I had no means of knowing. I know they lived very comfortably, and that is all I know about them."

And at fol. 188, "Mr. Storum was cooking on the lakes when he was able up to the time he went to Washington."

Emeline Coy testified at fol. 193, "I have heard Mr. Storum talk about Mr. Talbert being so kind to him and bringing him things—he said Mr. Talbert brought him medicine and gave him money to get medicine."

And at fol. 195, "I heard Mr. Storum tell about Mr. Talbert fixing the house and building on a new shed—he said he was not able to build it at that time. I heard Mr. Storum tell about his fixing the sidewalk."

And at fol. 202, "He spoke about Mr. Talbert helping him; he did not speak about borrowing any. I don't know whether Mr. Storum paid Mr. Talbert back for work which he did for him; I don't know whether he paid him or not for building the shed, that I don't know. I can't say anything about whether there were any settlements between them from time to time."

William Talbert, a son of Robert Talbert, at fol. 207, testified, "Often, on returning from the market, my brother and I would stop with the wagon and leave things that father would buy for Mr. Storum. These were meats, vegetables, fruits and market truck—I carried provisions direct from the house."

The witness Sally Jones, who was a sister of Wil-

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liam Storum, testified at fol. 181, "When he, Storum, was not afflicted with rheumatism he was an active, energetic man. He was very saving of his money. He was a man of good habits."

POINT III.

The plaintiff was bound to prove his interest not only as pleaded (fol. 13), but also as provided and prescribed in the certificate of insurance (fol. 36), and no action is necessary on the part of the defendant to avoid the assignment until this is done.

Alabama Gold Co. vs. Mobile Mutual, 81 Ala., 329.
Ruse vs. Mutual Benefit, 23 N. Y., 516, 527.
Henry vs. Grand Lodge, 15 Ill. App., 151.

POINT IV.

That the learned referee erred in denying the motion of the defendant for a non-suit when the plaintiff rested, on the ground that the plaintiff had not made out a case.

At fol. 215 the defendant duly moved the court for a non-suit on the ground that the plaintiff had not made out a case. Motion denied. Exception to defendant.

The plaintiff in his complaint alleges (fol. 13) that he

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possessed an insurable interest in the number equal to the amount assigned.

The defendant in his answer (fol. 53) denies this and puts the question of the plaintiff's interest squarely at issue.

The certificate, under which the plaintiff claims (fol. 36) requires the plaintiff to have an insurable interest in the number equal to the amount assigned.

There is no evidence of whatsoever nature establishing the value of the plaintiff's interest in the number.

The motion for a non-suit should have been granted.

Carpenter vs. Smith, 10 Barb., 663.
Ruse vs. Mutual Benefit, 23 N. Y., 516, 527.
Stuart vs. Simpson, 1 Wend., 376.
Roberts vs. Chittenden, 88 N. Y., 33.
Alabama Gold Life Insurance Company vs. Mobile Mutual Insurance Company, 81 Ala., 329.

POINT V.

That the learned referee erred in granting the motion (fol. 258) to strike out the conversation from fols. 134 to 139 for all objections to its competency or the competency of the witness were waived and the error, if any, was cured by the plaintiff asking for the identical conversation (see fol. 139) upon the cross examination. (See line 8, fol. 145.)

Trow vs. Shannon, 8 Daly, 239.
Grimm vs. Hamel, 2 Hilt. 434.

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POINT VI.

The following cases are not in point and can be distinguished from the case at bar, in that there is no requirement in the constitution, by-laws or certificate of insurance that the assignee should possess any interest in the life assured; whereas in the case at bar it is expressly provided in the certificate of insurance that he shall not only have an interest, but *that interest* shall be equal to the amount assigned.

No relationship existed between the assurer and his assignee (fols. 122 and 283).

Olmsted vs. Keyes, 85 N. Y., 593.

Miller vs. Eagle Life and Health Insurance Co., 2 E. D. Smith, 282.

Gratton vs. National Life, 15 Hun, 77.

St. John vs. The American Mutual Life, 13 N. Y., 31.

Valton vs. National Fund Life Association, 20 N. Y., 32.

Tucker vs. Mutual Benefit Life, 50 Hun, 50.

Trumann vs. National Benefit Society, 42 Hun, 254.

Rawls vs. American Mutual Life, 27 N. Y., 282.

Sabin vs. Grand Lodge, 6 N. Y. St. Rep., 151.

McFarland vs. Creath, 35 Mo. App., 112, 122.

Rawls vs. American Life Association, 36 Barb. 357.

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The provision that the assignee must possess an interest equal to the amount assigned is of equal force as though the same were a statutory enactment.

Sanger vs. Rothschild, 123 N. Y., 577.
Kehlenbeck vs. Logeman, 10 Daly, 447.
Ruse vs. Mutual Benefit, 23 N. Y., 516.

POINT VII.

That the judgment should be reversed and a new trial ordered, with costs to abide the event.

J. L. SLATER,
105 Erie County Savings Bank Building,
Buffalo, N. Y.

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SUPREME COURT.

APPELLATE DIVISION—FOURTH DEPARTMENT.

ANNA MARIA TALBERT, AS ADMINISTRATRIX, ETC., OF ROBERT TALBERT, DECEASED,

Respondent,

AGAINST

JAMES STORUM, AS ADMINISTRATOR, ETC., OF WILLIAM STORUM, DECEASED,

Appellant.

RESPONDENTS' BRIEF.

PRELIMINARY STATEMENT.

This is an appeal from a judgment in favor of the plaintiff, entered in Erie County Clerk's office, August 3, 1895. The action was brought by Robert Talbert against Mutual Reserve Fund Life Association to recover $1,000 upon a certificate of insurance issued to William Storum. After the commencement of the action James Storum was appointed administrator of the estate of William Storum, deceased, and thereupon was interpleaded as defendant, and after being so interpleaded the original

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defendant paid into court the sum of $989.30. Thereafter Robert Talbert died and Anna Maria Talbert was appointed administratrix of his estate and the action was revived and continued in her name as such administratrix. The cause was subsequently referred to Clarence M. Bushnell to hear, try and determine the same. His report was in favor of the plaintiff, and upon his report said judgment was entered.

FACTS.

The certificate in question was issued August 7, 1883 (pages 6–10) and was made payable to the legal representatives of William Storum (fol. 27). On the 26th day of October, 1883 this certificate was assigned by William Storum, *under seal*, and in the presence of a witness, to Robert Talbert. Fol. 305–306, also fol. 113–114. This assignment reads: "For value received I do hereby assign, transfer and set over * * * * the above named Certificate of Membership, and all sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise or to be had or made by virtue thereof; to have and to hold unto the said Robert Talbert." On November 2, 1883, the insurance company consented to said assignment. (Fol. 307, also fol. 115). From the time of such assignment until his death Robert Talbert had possession of said certificate (fol. 309) and until the death of Storum, January 15, 1891 (fol. 309) Talbert paid all the assessments upon said certificate amounting to $349.88 (fol. 311–313). From the time of such assignment until his death Storum was on friendly relations with Talbert, and it does not appear that the former ever made any claim to said certificate. William Storum was a poor man and for many years in poor health, and at the time of such assignment he was, and admitted himself to be, un-

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der great obligations to and financially indebted to Mr. Talbert for kindnesses and aid extending over many years (fols. 157–209, also 314). The certificate of membership or insurance contains this provision: "Written notice of all assignments to be valid must be received and approved by the association; and the beneficiary or assignee must possess an insurable interest in the above named number, equal to the amount assigned."

There is nothing else in the certificate and there is nothing in the constitution and by-laws restricting the assignment of the certificate or the changing the beneficiary thereof (fol. 213).

The defendant called three witnesses and put in evidence eight exhibits. The evidence of the first witness, James Storum, is found on pages 30 to 34. His evidence is of no importance, unless to show that William Storum was not in absolute want. The evidence of Serepta Storum, the second witness called by defendant, is found on pages 34 to 40. Her evidence tends to show that her father had a little property. She also relates two conversations had with Talbert, one in 1883 and one in 1887. These conversations, given between folios 134 and 139, were struck out by the referee, but she afterwards repeats them on cross-examination. She says Talbert wished her to take out $2,000 insurance on her father's life, and when she told him she could not carry more than $1,000 he told her he would take out $1,000 and keep it up for her. In the second conversation had in 1887 he told her he had let his policy lapse (fols. 134–140 and 141–146). The third witness called by defendant, William Talbert, testifies as to the meaning of defendant's Exhibit No. 2 (fols. 217–225 and 247–257). This witness' explanation of the meaning of Exhibit No. 2 corresponds with the statement made by Robert Talbert to James Storum (fol. 125).

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Defendants' Exhibit No. 1 was an envelope and is not printed. Exhibit No. 2 is a letter written by William Talbert for his father to James Storum's wife (fols. 226–231. Exhibit No. 3 was an envelope (fol. 230.) Exhibit No. 4 is a letter written by Mrs. Talbert for her husband to William Storum (fols. 232–243). It does not appear that there was any Exhibit No. 5. Exhibit No. 6 was a mortgage dated 1852, given by William Storum for $250, with an endorsement thereon showing payment of $200 in 1853 (fols. 243–244). Exhibits No. 7 and 8 are two discharges of mortgages, one of Exhibit No. 6 and one of a $100 mortgage dated 1878. Both discharges are dated in 1887 (fols. 244–247 and fols. 261–266).

POINTS.

One.—The mortgage and discharges, Exhibits Nos. 6, 7 and 8, are immaterial to any issue involved in this action. They appear to have been independent transactions; they bear no relation either in character nor time to this certificate or its assignment. They are not inconsistent with the claim that William Storum was indebted to Robert Talbert all the time between 1852 and 1891.

Two.—Exhibit No. 4 (fols. 232–243) is of no importance. This letter was written in 1887, four years after the assignment of this certificate, and does not contain one word that throws light upon any issue in this action.

Three.—Defendant's attorney attaches importance to two sentences contained in exhibit No. 2 (fol. 228.) This letter was written by William Talbert under a general direction from his father to answer a letter relating to family matters. It does

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not appear that his father ever saw this letter or ever knew just what it contained (fols. 217–226 and 247–257). It was written after the death of William Storum, and whatever its meaning it is of no controlling importance. The sentences in question are: "It was only by much persuasion that I got Mr. Storum's consent to have him insured, and as Serepta would not take it out, he, in consideration of the many favors I did for him, made me a party to the same."

"As I understand it James is as much a beneficiary as Serepta after the expenses are paid."—If this language refers to the certificate in suit *only* then it is in conflict with the evidence of Serepta Storum. She says this certificate was taken out for *her* (fols. 136, 141–146). If this letter refers to *two* certificates, as William Talbert says, then it is in harmony with the statement made to James Storum by Robert Talbert (fol. 125).

The most rational explanation of the two sentences above quoted is that they refer to the *two* certificates.

It is unreasonable to say that Robert Talbert asserts that he persuaded Storum to take out this certificate "in consideration of the many favors I had done him," and then in the next sentence that "James is as much a beneficiary as Serepta." The true explanation of this letter is found in the testimony of James (fol. 125): "The conversation then turned on the subject of life insurance; the policy which *my sister held*, and he said that I had as much interest in *that policy* as my sister had."—*It is perfectly evident that after the death of his father James made a claim to a part of the proceeds of Serepta's policy, and she in order to defeat that claim makes the claim that it is the certificate in suit in which James has an interest.*

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Four.—If Serepta Storum's evidence is to be believed then under no circumstances can this defendant succeed, for in that case the moneys belong to her and not to the administrator. If James Storum's evidence is believed, then the policy held by his sister and not the one in suit was the one belonging to the two children.

It necessarily follows, therefore, that this case must be disposed of upon the plaintiff's evidence.

Five.—Defendant's answer is in effect a general denial, and under such an answer he can not recover in this case.

The defendant seeks equitable relief, and he should plead facts entitling him to such relief. The assignment on its face is absolute and under seal, and this instrument the defendant seeks to set aside, and this he cannot do in a court of law. This is the view taken by the General Term when this case was before it on appeal, and that view is evidently correct.

Talbert vs. Storum, 50 *N. Y., Rep.* 267.

Six.—The assignment being under seal the defendant cannot deny a sufficient valuable consideration nor a sufficient insurable interest in the plaintiff therefor.

2 *Kent v. Cam*, 464, *and notes.*
Torry v. Black, 58 *N. Y.*, 185–190.

The assignment in question is not an "executory instrument," therefore it does not come within the provisions of sec. 840, C. C. P.

The rules relating to such an instrument are that its terms, or want of consideration, or character, cannot be changed by oral proof.

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Wood v. Chapin, 13 *N. Y.*, 509.
Halliday v. Hart, 30 *N. Y.*, 474.
Morris v. Ward, 36 *N. Y.*, 587.

The last three cases were decided upon real estate deeds, but are controlling here.

Seven.—The defendant is estopped from denying that this assignment was executed under seal and for a sufficient consideration.

The Metropolitan Life Insurance Company v. McCoy, 35 *N. Y.*, *Rep.* 49.

When an action is brought upon an executed sealed instrument, by which the defendant's intestate was estopped from denying the consideration of the instrument sued upon, his personal representative is likewise estopped from denying the same.

Bender v. Bender, 88 *Hun.*, 448.

Eight.—The Mutual Reserve Fund Life Association was originally incorporated under chap. 267, laws of 1875, and re-incorporated December 26, 1883, under chap. 175, laws of 1883. Section 18 of the latter act provides: "Membership in any corporation, association or society transacting the business of life or casualty insurance, or both, upon the co-operative or assessment plan, shall give to any member thereof the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries."

By the assignment of this certificate to Robert Talbert William Storum changed his beneficiary.—The language used in this instrument (which has

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been called an assignment) is very broad and clearly embraces the exercise of the power of appointment which the insured had under the above statute. The words of the assignment—"certificate of membership and all sums of money, interest, benefit and advantage, whatsoever, now due or to hereafter arise or to be had or made by virtue thereof,"—were evidently intended to make Mr. Talbert the new and sole beneficiary under this certificate. It is to be remembered that no person is named as beneficiary in the certificate. The beneficiary is the representative of the insured.

Hence there was less reason for having a new certificate issued or having the name of the new beneficiary inserted in the old certificate. This assignment was made upon a blank furnished by the association. The association was duly notified of and consented to the assignment. No reason has ever been suggested why this assignment should not be construed as an exercise of the power of appointmment possessed by Storum.

Nine.—This insurance association could not insert in its by-laws or certificate any clause limiting the operation of Sect. 18, Chapter 105, Laws of 1883. The clause in the certificate requiring the beneficiary or assignee to possess an insurable interest equal to the amount assigned is in conflict with the above statute and is therefore inoperation.

Moreover, it has been repeatedly held, that it is not necessary that the beneficiary named in the certificates issued by these co-operative insurance companies should possess any insurable interest.

Sabin v. Phinney, 47 *N. Y. Rep.* 903.
Massey v. Mutual Relief Society of Rochester, 102 *N. Y.*, 523.

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Ten.—The clause in the certificate requiring the beneficiary or assignee to possess an insurable interest equal to the amount assigned is for the benefit of the association. This defendant cannot take advantage of that provision.

Eleven.—A life insurance is not like a fire insurance, a contract of idemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life. Like every other contract to pay money, such a policy is a chose in action, with all the ordinary incidents of every chose in action. It may be assigned to any person like any chose action.

Olmsted v. Keyes, et al., 85 *N. Y.*, 593.

One who has obtained a valid insurance upon his own life may dispose of it as he sees fit, and it is immaterial that the assignee has no interest in the life.

Valton, et al., v. Nat. Fund Life Ins. Co., 20 *N. Y.*, 32.
Canaher v. Mut. Life Ins. Co., 11 *N. Y.*, *Rep.* 665.

Twelve.—The defendant is not in a position to raise any question here except as to the Eleventh and Thirteenth findings, to which findings alone he has excepted. (Fol. 322, Code C. P., Sec. 994.) There is abundant evidence to sustain finding eleven. The evidence of Sally Jones, Emeline Coy and Wm. Talbert abundantly sustains this finding. The seal sustains this finding. The same evidence sustains finding Tnirteen. These findings, however, are not necessary to uphold the judgment. In my view of the case they are of no importance.

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Thirteen.—Equity requires that this judgment should be upheld. The intention of Storum and Talbert was that the latter should have this money. Talbert held this policy with the consent of Storum. Storum never paid a dollar to the insurance company. Seldom has one ever had such a friend as Talbert was to Storum. See evidence of Storum's sister; pages 40–48.

The judgment appealed from should be affirmed with costs.

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